S. HRG. 98-1263

CONSTITUTIONAL CONVENTIONS PROCEDURES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 119

A BILL TO PROVIDE PROCEDURES FOR CALLING FEDERAL CONSTITUTIONAL CONVENTIONS UNDER ARTICLE V FOR THE PURPOSE OF PROPOSING AMENDMENTS TO THE U.S. CONSTITUTION

APRIL 25, 1984

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CONSTITUTIONAL CONVENTIONS PROCEDURES

WEDNESDAY, APRIL 25, 1984

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in room SD–226 of the Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman) presiding.

Present: Senator Leahy.

Staff present: Dick Bowman (committee); Stephen J. Markman, chief counsel and staff director (subcommittee); and Carol Epps, chief clerk (subcommittee).

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. Ladies and gentlemen, this morning's hearing marks the culmination of a long series of hearings by this committee over the past decade on the subject of legislation to set forth procedures for a constitutional amending convention under article V.

In particular, the focus of this hearing is upon S. 119, introduced by myself, and Senator DeConcini, and Senator Thurmond, the Constitutional Convention Implementation Act which is currently on the agenda of this committee. S. 119 and its predecessor, during the 97th Congress were both approved without objection by the Subcommittee on the Constitution.

During the course of the past several weeks, I have been meeting with the distinguished Senator from Vermont, Senator Leahy, as well as the distinguished ranking minority member of this committee, Senator Biden, in an effort to address remaining differences on this proposal.

It is my hope that this morning's hearing will make an important contribution in enabling us to move ahead on this extremely significant legislation.

I would like to take this opportunity to extend my appreciation to these Members as well as to other members of the committee for their efforts in attempting to put together responsible legislation in this extremely difficult constitutional area.

The present legislation, S. 119, is ultimately grounded in Congress' authority under article V of the Constitution to call a constitutional convention upon the application of a sufficient number of States.

Because of the absence of the precedent or any precedent for such a convention, many of the issues involved with S. 119 are issues of first impression and involve matters on which reasonable persons committed to an honest reading of the mandate of article V can disagree.

In drafting S. 119, its authors have attempted, to the best of their ability, to be faithful to the text of the amending clause, faithful to the legislative history surrounding its adoption into the Constitution, and faithful to the overall purpose to be served by this provision within our constitutional structure.

I would emphasize again, however, that there are a number of difficult issues concerning which responsible Members of Congress may disagree. As a result, the authors of this legislation have, and will continue to be, been receptive to efforts within this committee and within this body to establish the broadest consensus measure possible.

In my view, there are perhaps three fundamental principles that lie at the foundation of the pending measure that have determined its provisions

First, S. 119 views the alternative amending procedures within article V as essentially symmetrical processes which accord the National and State governments generally equivalent opportunities to propose changes in the Constitution. As a result, this measure accords the States substantial, although not unlimited, autonomy in the constitutional convention process.

Second, S. 119 views the constitutional convention process as the principal means by which the States can redress perceived defects in the constitutional process, including those related to the operations of the national government. As a result, this measure attempts to restrict the ability of the Congress, in carrying out its own unquestioned responsibility, to obstruct or impede a constitutional convention genuinely desired by the States.

Finally, S. 119 views the constitutional convention as a temporary and independent branch of the National Government. As a result, while it is free to act within its authority to propose amendments to the Constitution, it is also subject to checks and balances designed to ensure that its actions are contained within the proper and limited scope of its authority. In other words, as with any other institution of Government, the powers of the convention are defined and limited powers and subject to check by other institutions of Government.

In conclusion, let me again emphasize one point that I have made repeatedly about the pending measure since its original introduction 5 years ago. That is despite the fact that the ongoing efforts by the States to call a constitutional convention on the subject of a balanced budget has clearly increased the sense of urgency for a bill such as S. 119. This measure is neither designed to promote nor to impede the calling of a convention on the balanced budget issue or any other issue.

While I recognize the difficulty in totally divorcing the balanced budget issue from the conventions procedures issue, that has been my objective from the outset.

I believe that S. 119 represents a good-faith effort to establish genuinely neutral procedures for a constitutional convention on any matter determined by the parties.

Ladies and gentlemen, I thank you for your interest in this matter, and, of course, welcome our two outstanding witnesses to the committee this morning. I am conducting another hearing two floors up in the Labor Committee so that Senator Leahy is going to come and complete this hearing.

With that I will recess until Senator Leahy arrives, and then he will complete the hearing so that we can establish this very important record.

[Brief recess.]

[The following was received for the record:]

PREPARED STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY.

MR. CHAIRMAN:

I COMMEND YOU FOR HOLDING THIS HEARING ON THE MATTER OF ESTABLISHING PROCEDURES FOR CONDUCTING A CONSTITUTIONAL CONVENTION. YOUR PROMPTNESS IN CONVENING THIS HEARING REFLECTS THE HIGH DEGREE OF IMPORTANCE THAT YOU PLACE UPON CONGRESS' BEING PREPARED IN THE EVENT THAT THE REQUISITE NUMBER OF STATES CALL FOR SUCH A CONVENTION.

TODAY WE CONSIDER THE PORTION OF ARTICLE V OF THE CONSTITUTION THAT AUTHORIZES THE AMENDMENT OF THAT DOCUMENT BY MEANS OF A CONVENTION--A METHOD WHICH HAS NEVER BEEN USED DURING THE LIFE OF THIS REPUBLIC. WE WILL ALSO EXAMINE PROCEDURES DESIGNED TO EFFECTUATE THIS PROVISION. WHILE THERE MAY BE STRONGLY DIVERGENT VIEWPOINTS ON THE USEFULNESS AND WISDOM OF USING THE CONSTITUTIONAL CONVENTION METHOD OF AMENDING THE CONSTITUTION, THERE SEEMS TO BE A CONSENSUS AS TO WHAT THE MAJOR ISSUES ARE.

FIRST, THERE IS THE QUESTION OF WHICH LEGISLATIVE AUTHORITY SHOULD DECIDE WHETHER A STATE APPLICATION CALLING FOR A CONVENTION HAS BEEN ADOPTED IN COMPLIANCE WITH STATE RULES GOVERNING THE APPROVAL OF SUCH A MEASURE. SHOULD THE STATE LEGISLATURE MAKE THIS DETERMINATION, OR, SINCE CONGRESS IS GIVEN THE DUTY OF CALLING A CONVENTION WHEN IT RECEIVES THIRTY-FOUR VALID APPLICATIONS, SHOULD SUCH DECISIONS BE MADE AT THE FEDERAL LEVEL?

SECOND, THERE IS THE ISSUE OF THE EXTENT TO WHICH CONGRESS SHOULD INJECT ITSELF INTO THE MATTER OF SETTING THE INTERNAL PROCEDURES OF THE CONVENTION. THIS ISSUE INVOLVES SUCH MATTERS AS THE NUMBER OF VOTES REQUIRED FOR THE APPROVAL OF PROPOSED AMENDMENTS, THE NUMBER OF DELEGATES NECESSARILY IN ATTENDANCE FOR A QUORUM, AND THE METHOD FOR CUTTING OFF EXTENDED DEBATE.

THIRD, THERE IS THE QUESTION OF WHO SHOULD FUND THE CONVENTION--THE STATES OR THE FEDERAL GOVERNMENT.

THESE ARE TOUGH QUESTIONS AND THERE IS NO PRECEDENT TO GUIDE US IN FINDING ANSWERS TO THEM. AS AN ORIGINAL COSPONSOR OF S. 119, I BELIEVE THAT THESE ISSUES HAVE BEEN ADDRESSED BY THIS BILL IN A WAY THAT REFLECTS THE INTENT OF THE FRAMERS THAT A CONSTITUTIONAL CONVENTION BE, IN REALITY, A "STATES'" CONVENTION. ACCEPTANCE OF THIS PREMISE MANDATES THAT THERE BE AS LITTLE FEDERAL INVOLVEMENT IN THE AFFAIRS OF THE CONVENTION AS POSSIBLE.

OUR HEARING TODAY WILL NO DOUBT PROVIDE US WITH DIFFERENT PERSPECTIVES AND INSIGHTS ON THESE MAJOR ISSUES. I LOOK FORWARD TO HEARING FROM OUR WITNESSES.

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA.

ARTICLE FIVE PROVIDES TWO METHODS OF AMENDING THE CONSTITUTION OF THE UNITED STATES. THE ONE WE HAVE ALWAYS USED, THAT OF TWO-THIRDS OF EACH HOUSE OF CONGRESS PROPOSING AN AMENDMENT TO BE RATIFIED BY THREE-FOURTHS OF THE STATE LEGISLATURES; AND THAT METHOD WHICH HAS NEVER BEFORE BEEN USED, TWO-THIRDS OF THE STATE LEGISLATURES CALLING FOR A CONVENTION TO PROPOSE AN AMENDMENT THAT WOULD THEN HAVE TO BE RATIFIED BY THE STATES.

CLEARLY, OUR FOUNDING FATHERS FORSAW THE POSSIBILITY THAT THE CONGRESS MIGHT RESIST AN AMENDMENT THAT WAS DESIRED BY AN OVERWHELMING MAJORITY OF THE STATES. FOR THAT REASON, THEY PROVIDED THE STATES WITH AN ALTERNATIVE MEANS OF AMENDING THE CONSTITUTION.

EXACTLY SUCH A SITUATION EXISTS TODAY. THIRTY-TWO OF THE NECESSARY THIRTY-FOUR STATE LEGISLATURES HAVE CALLED FOR A CONSTITUTIONAL CONVENTION TO PROPOSE AN AMENDMENT TO REQUIRE A BALANCED FEDERAL BUDGET. NONETHELESS, THE HOUSE REFUSED TO PROPOSE SUCH AN AMENDMENT TO THE STATES IN 1982, EVEN THOUGH THE SENATE HAD ACTED, TO ALLOW THE PEOPLE OF EACH STATE TO VOTE ON THE AMENDMENT. AND I HOPE THE SENATE WILL SOON ACT AGAIN TO DO SO.

BUT IT INCREASINGLY SEEMS THAT SUCH A CONVENTION MAY BE NECESSARY AND WILL BE CALLED. IF THE CONGRESS CANNOT AGREE ON THE SPECIFIC FORM OF AN AMENDMENT, WE MUST, AT LEAST, DISCHARGE OUR OBLIGATION TO THE PEOPLE BY PROVIDING THE NECESSARY STATUTORY MECHANISM BY WHICH THE "STATES' ALTERNATIVE ROUTE" TO A CONSTITUTIONAL AMENDMENT CAN TAKE PLACE, WITH THE ORDER AND DECORUM SUCH A CONSTITUTIONALLY ENVISIONED PROCEDURE DESERVES.

THIS CONVENTION BELONGS TO THE PEOPLE OF THE STATES. THE FRAMERS INTENDED IT TO BE THEIR CONVENTION, TO BE CALLED WHEN CONGRESS WAS INTRANSIGENT AND UNWILLING TO WORK THE PUBLIC'S WILL. IT WOULD BE A DEFEAT OF THE FRAMER'S INTENT WERE THE CONGRESS TO RELEGATE THE CONVENTION TO A MERE ADVISORY BODY BY CONTROLLING THE FINANCES, INTERNAL PROCEDURES, AN THE EVENTUAL QUESTION OF WHETHER TO PROPOSE THE CONVENTION'S AMENDMENT TO THE STATES.

WHILE IT SEEMS PERFECTLY PROPER FOR THE CONGRESS TO LIMIT THE SCOPE OF THE CONVENTION TO THE PURPOSES FOR WHICH THE APPLICATIONS OF THE STATES WERE RECEIVED; MUCH BEYOND THAT, SEEMS MORE THAN WHAT THE FRAMERS INTENDED.

I LOOK FORWARD TO THE TESTIMONY TODAY WHICH WILL, I HOPE, EXPLORE THE QUESTION OF, HOW MUCH CONTROL BY THE CONGRESS IS APPROPRIATE, AS WELL AS THE OTHER QUESTIONS THAT MUST BE RESOLVED.

II

98TH CONGRESS
1ST SESSION

S. 119

To provide procedures for calling Federal constitutional conventions under article V for the purpose of proposing amendments to the United States Constitution.

IN THE SENATE OF THE UNITED STATES

JANUARY 26 (legislative day, JANUARY 25), 1983

Mr. HATCH (for himself, Mr. THURMOND, and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To provide procedures for calling Federal constitutional conventions under article V for the purpose of proposing amendments to the United States Constitution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Constitutional Convention Implemention Act of 1981".

APPLICATIONS FOR CONSTITUTIONAL CONVENTION

SEC. 2. (a) The legislature of a State, in making application to the Congress for a constitutional convention under article V of the Constitution of the United States, for the purpose of proposing one or more specific amendments, shall

adopt a resolution pursuant to this Act stating, in substance, that the legislature requests the calling of a convention for the purpose of proposing one or more specific amendments to the Constitution of the United States and stating the general subject of the amendment or amendments to be proposed.

(b) The procedures provided by this Act are required to be used whenever application is made to the Congress, under article V of the Constitution of the United States, for the calling of any convention for the purposes of proposing one or more specific amendments to the Constitution of the United States, each applying State stating in the terms of its application the general subject of the amendment or amendments to be proposed. This Act is not intended to apply to applications requesting a convention for any other purpose under article V of the Constitution.

APPLICATION PROCEDURE

SEC. 3. (a) The rules of procedure governing the adoption or withdrawal of a resolution pursuant to section 2 and section 5 of this Act are determinable by the State legislature except that the assent of the Governor shall be unnecessary.

(b) Questions concerning compliance with the rules governing the adoption or withdrawal of a State resolution cognizable under this Act are determinable by the State legislature.

TRANSMITTAL OF APPLICATIONS

SEC. 4. (a) Within thirty days after the adoption by the legislature of a State of a resolution to apply for the calling of a constitutional convention, the secretary of state of the State, or, if there be no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate and one to the Speaker of the House of Representatives.

(b) Each copy of the application so made by any State shall contain—

(1) the title of the resolution, the exact text of the resolution signed by the presiding officer of each house of the State legislature, the date on which the legislature adopted the resolution, and a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets forth the text of the resolution; and

(2) to the extent practicable, and if desired, a list of all State applications in effect on the date of adoption whose subject or subjects are substantially the same as the subject or subjects set forth in the application.

(c) Within ten days after receipt of a copy of any such application, the President of the Senate and Speaker of the House of Representatives shall report to the House of which he is presiding officer, identifying the State making application, the general subject of the application, and the number of States then having made application on such subject. The President of the Senate and Speaker of the House of Representatives shall jointly cause copies of such application to be sent to the presiding officer of each house of the legislature of every other State and to each Member of the Senate and House of Representatives of the Congress of the United States.

EFFECTIVE PERIOD OF APPLICATION

SEC. 5. (a) An application submitted to the Congress by a State, unless sooner withdrawn by the State legislature, shall remain effective for the lesser of the period specified in such application by the State legislature or for a period of seven calendar years after the date it is received by the Congress, except that whenever within a period of seven calendar years two-thirds or more of the several States have each submitted an application calling for a constitutional convention on the same general subject all such applications shall remain in effect until the Congress has taken action on a concurrent resolution, pursuant to section 6 of this Act, calling for a constitutional convention. An application which has

not been before the Congress for more than ten years on the effective date of this Act shall be effective for either the period specified in the first sentence of this ection or for four years from the effective date of this Act, whichever is greater.

(b) A State may withdraw its application calling for a constitutional convention by adopting and transmitting to the Congress a resolution of withdrawal in conformity with the procedures specified in sections 3 and 4 of this Act, except that no such withdrawal shall be effective as to any valid application made for a constitutional convention upon any subject after the date on which two-thirds or more of the State legislatures have valid applications pending before the Congress seeking amendments on the same general subjects.

CALLING OF A CONSTITUTIONAL CONVENTION

SEC. 6. (a) It shall be the duty of the Secretary of the Senate and the Clerk of the House of Representatives to maintain a record of all applications received by the President of the Senate and Speaker of the House of Representatives from States for the calling of a constitutional convention upon each general subject. Whenever applications made by two-thirds or more of the States with respect to the same general subject have been received, the Secretary and the Clerk shall so report within five days, in writing to the officer to whom those applications were transmitted, and such offi-

cer within five days thereupon shall announce on the floor of the House of which he is an officer the substance of such report. It shall then be the duty of such House to determine that there are in effect valid applications made by two-thirds of the States with respect to the same general subject. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the calling of a constitutional convention upon the same general subject, it shall be the duty of that House, within forty-five calendar days following the report of the Clerk and the Secretary, to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that general subject. Each such concurrent resolution shall (1) designate the place and time of meeting of the convention, and (2) set forth the general subject of the amendment or amendments for the consideration of which the convention is called. A copy of each such concurrent resolution agreed to by both Houses of the Congress shall be transmitted forthwith to the Governor and to the presiding officer of each house of the legislature of each State.

(b) The convention shall be convened not later than eight months after adoption of the resolution.

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DELEGATES

SEC. 7. (a) Each State shall appoint, in such manner as the legislature thereof may direct, a number of delegates, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress. No Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed as delegate. Any vacancy occurring in a State delegation shall be filled by appointment of the legislature of that State.

(b) The secretary of state of each State, or, if there be no such officer, the person charged by State law to perform such function, shall certify to the President of the Senate and the Speaker of the House of Representatives the name of each delegate elected or appointed by the legislature of the State pursuant to this section.

(c) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a session of the convention, and in going to and returning from the same; and for any speech or debate in the convention they shall not be questioned in any other place.

CONVENING THE CONVENTION

SEC. 8. (a) Of those persons serving as chief justices of the highest courts of the States, the person who is senior in years of service as such a chief justice shall convene the con-

stitutional convention. He shall administer the oath of office of the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe to an oath by which he shall be committed during the conduct of the convention to comply with the Constitution of the United States. Further proceedings of the convention shall be conducted in accordance with such rules, not inconsistent with this Act as the convention may adopt.

(b) No Federal funds may be appropriated specifically for the purposes of payment of the expenses of the convention. The convention shall be responsible for apportioning its costs among the States.

(c) The Administrator of General Services shall provide such facilities, and the Congress and each executive department, agency, or authority of the United States shall provide such information and assistance as the convention may require, upon written request made by the elected presiding officer of the convention.

PROCEDURES OF THE CONVENTION

SEC. 9. (a) In voting on any question before the convention, including the proposal of amendments, each delegate shall have one vote.

(b) The convention shall keep a daily verbatim record of its proceedings and publish the same. The vote of the delegates on any question shall be entered on the record.

(c) The convention shall terminate its proceedings within six months after convening unless the period is extended by concurrent resolution of the Congress of the United States upon request from the convention.

(d) Within thirty days after the termination of the proceedings of the convention, the presiding officer shall transmit to the Archivist of the United States all records of official proceedings of the convention.

PROPOSAL OF AMENDMENTS

SEC. 10. No convention called under this Act may propose any amendment or amendments of a general subject different from that stated in the concurrent resolution calling the convention.

APPROVAL BY THE CONGRESS AND TRANSMITTAL TO THE STATES FOR RATIFICATION

SEC. 11. (a) The presiding officer of the convention shall, within thirty days after the termination of its proceedings, submit to the Congress the exact text of any amendment or amendments agreed upon by the convention.

(b) Whenever a constitutional convention called under this Act has transmitted to the Congress a proposed amendment to the Constitution, the President of the Senate and the

Speaker of the House of Representatives, acting jointly, shall transmit such amendment to the Administrator of General Services upon the expiration of the first period of thirty days of continuous session of the Congress following the date of receipt of such amendment. Within that period both Houses of the Congress may agree to a concurrent resolution stating that the Congress does not direct the submission of such proposed amendment to the States because such proposed amendment relates to or includes a general subject which differs from or was not included as one of the general subjects named or described in the concurrent resolution of the Congress by which the convention was called. Such resolution shall be transmitted to the legislatures of the States and the Administrator of General Services.

(c) For the purposes of subsection 11(b), (i) the continuity of a session of the Congress shall be broken only by an adjournment of the Congress sine die, and (ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of the period of thirty days.

(d) Upon receipt of any such proposed amendment to the Constitution, the Administrator shall transmit forthwith to each of the several States a duly certified copy thereof, and a copy of any concurrent resolution agreed to by both Houses of the Congress which prescribes the mode in which such

amendment shall be ratified, unless the Administrator has also received a concurrent resolution pursuant to subsection 11(b) stating that Congress does not direct the submission of such proposed amendment to the States. Such concurrent resolution may also prescribe the time within which such amendment shall be ratified in the event that the amendment itself contains no such provision. In no case shall such a resolution prescribe a period for ratification of less than four years.

RATIFICATION OF PROPOSED AMENDMENTS

SEC. 12. (a) Any amendment proposed by the convention and submitted to the States in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitution of the United States when duly ratified by three-fourths of the States in the manner and within the time specified consistent with the provisions of article V of the Constitution of the United States.

(b) The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy of the State action ratifying any proposed amendment to the Administrator of General Services.

RESCISSION OF RATIFICATIONS

SEC. 13. (a) Any State may rescind its ratification of a proposed amendment by the same processes by which it rati-

fied the proposed amendment, unlesss specified otherwise by such State, except that no State may rescind when there are existing valid ratifications of such amendment by three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal.

PROCLAMATION OF CONSTITUTIONAL AMENDMENTS

SEC. 14. The Administrator of General Services, when three-fourths of the several States have ratified a proposed amendment to the Constitution of the United States, shall issue a proclamation that the amendment is a part of the Constitution of the United States.

JUDICIAL REVIEW

SEC. 15. (a) Any State aggrieved by any determination or finding, or by any failure of Congress to make a determination or finding within the periods provided, under section 6 or section 11 of this Act may bring an action in the Supreme Court of the United States against the Secretary of the Senate and the Clerk of the House of Representatives or, where appropriate, the Administrator of General Services, and such other parties as may be necessary to afford the relief sought. Such an action shall be given priority on the Court's docket.

(b) Every claim arising under this Act shall be barred unless suit is filed thereon within sixty days after such claim first arises.

(c) The right to review by the Supreme Court provided under subsection (a) does not limit or restrict the right to judicial review of any other determination or decision made under this Act of such review as is otherwise provided by the Constitution or any other law of the United States.

EFFECTIVE DATE OF AMENDMENTS

SEC. 16. An amendment proposed to the Constitution of the United States shall be effective from the date specified therein or, if no date is specified, then on the date on which the last State necessary to constitute three-fourths of the States of the United States, as provided for in article V, has ratified the same.

[Senator Leahy assumes the chair.]

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. We are sort of playing musical chairs here this morning, and the chairman had to go to another meeting, as often happens in the Senate—we usually each have three or four meetings going on at once, if we are lucky—oftentimes far more. And Senator Hatch, who serves with distinction on this and many other committees, has one of those meetings upstairs, as I understand, so I will take over.

I wonder if Professor Cogan and Mr. Armor could come forward, just both come on up to the table, and, if you could just sit there for a moment, I am going to summarize my opening statement. I know that both you gentlemen also have a busy schedule. Once I have finished, you might want also to summarize your statements.

As Senator Hatch said during his opening statement, he has been meeting with me and with Senator Biden in an effort to address remaining differences in the proposal for procedures for a constitutional convention, and I would hope that, with your testimony and that which we have had before, that we might reach a consensus as to how we will get those procedures, which means uniting people who are in favor of a constitutional convention and those who are opposed to a constitutional convention. But I think most of us, whether we favor or are opposed, are kind of ennerved at the idea of one starting without some well laid out procedures prior to it coming.

My own State, the State of Vermont, which has looked at the constitutional convention in its State legislature, has turned a rather emphatic thumbs down on it, and in our town meetings, which are probably the quintessential participatory democracy, when they voted on them, after any kind of a debate, have turned them down—in other words, turned down the idea of a constitutional convention. And this is a basically very conservative Republican State, for whatever that's worth.

And yet when I talk with Vermonters back home, whether they are for or against a constitutional convention, they are very concerned what the procedures might be—and I think that is a concern of most small States. They want to make sure that if there is one, that somehow we don't find small States ignored. This is not a new issue. For more than a decade there has been concern over the prospect of a constitutional convention under article V. We will probably find more impetus today because of the concern that the Congress and the President may not address some of the problems that might be addressed there. I personally feel that if Congress and the President do their jobs, there wouldn't be any need for that, but, notwithstanding, as I said before, we need legislation that governs the procedures.

In his thoroughly researched statement accompanying the introduction of S. 119, Senator Hatch echoes the concerns of many Members of this body and of the other body, as well as virtually every legal scholar who has thought about the possibility of a con-

stitutional convention. The language of article V raises innumerable questions of interpretation and offers almost no answers.

Relevant debate in the Constitutional Convention nearly 200 years ago sheds little light on the answers, and since there has never been a convention actually called under article V, there has been no opportunity for the question to be confronted and answered. We have no track record on these issues.

And yet more than 30 State legislatures have either acted or purported to act to ask Congress to convene a constitutional convention on a balanced budget amendment. Of course, with only 34 States needed to make up two-thirds of the States, it is understandable that the Constitutional Convention Implementation Act was introduced in the 98th Congress, as it was in the 97th.

No one in Congress sets out to draft unconstitutional legislation, but in the case of S. 119, there is far less guidance than we ordinarily enjoy as to where the lines of authority end and the powers or prerogatives of another branch of Government or another forum begin.

But we want to have as much help as we can. We have asked for experts all around the country. A few weeks ago I wrote to 10 prominent legal scholars about this legislation and the broader topic of a law relating to a constitutional convention. We are getting back answers on that, and that helps a great deal.

I think the most widely debated proposal was a bill introduced by Senator Sam Ervin in the 90th Congress and adopted by the Senate in October 1971. In fact, it was passed by this body, so it serves as a benchmark. That is not to say that a different bill cannot be a better bill, but the differences deserve close examination.

For example, the Ervin bill provides that a State application for a convention must be made in the same manner as provided for the adoption of a statute by the State legislature, but without the necessity of review by the Governor. The current bill allows the State legislatures to determine the rules for the adoption of an application resolution. Thus, you could have the rules vary from State to State.

Article V, of course, is silent on the issue.

Under the Ervin bill, Congress determines the validity of State applications for a convention. Under S. 119, the States in effect review the validity of their own actions.

Under the Ervin bill, the delegates to a convention would be popularly elected by congressional districts, plus two statewide. S. 119 leaves the method of choice of delegates up to the States. They could appoint them, if they wanted.

The bills differ on the issue of the kind of convention majority needed for action. The Ervin bill requires action by two-thirds of the total number of delegates to the convention. S. 119 is silent on the issue.

The Ervin bill went far toward making Congress' actions in making procedural determinations nonreviewable. S. 119 creates a narrow right of judicial review.

So these are just some of the differences, if we are going to work off those two pieces of legislation. I mentioned earlier the 10 scholars I wrote to—Prof. Neil Cogan is one of them, and I am glad he could be with us today.

And, Professor, we will start with you; your whole statement will be part of the record. I wonder if you might summarize it for us.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

FOR MORE THAN A DECADE THERE HAS BEEN MUCH CONCERN OVER THE PROSPECT OF A CONSTITUTIONAL CONVENTION UNDER ARTICLE V OF THE UNITED STATES CONSTITUTION. I BELIEVE THAT THERE IS NO NEED AT THE PRESENT TIME FOR A CONVENTION TO SOLVE ANY PROBLEM ON THE NATIONAL AGENDA, BECAUSE I DON'T BELIEVE THERE IS ANY PROBLEM THAT CONGRESS AND THE STATES CANNOT ADDRESS, IF THEY CHOOSE TO ACT.

BUT I BELIEVE THAT IT IS TIME FOR CONGRESS TO ADOPT LEGISLATION TO GOVERN CONVENTION PROCEDURES, IN THE EVENT THAT TWO-THIRDS OF THE STATES DO ACT TO CALL A CONVENTION UNDER ARTICLE V.

IN HIS VERY THOROUGH AND WELL RESEARCHED STATEMENT ACCOMPANYING THE INTRODUCTION OF S.119, SEN. HATCH ECHOES THE CONCERNS OF MANY MEMBERS OF THIS BODY AND OF THE HOUSE, AS WELL AS VIRTUALLY EVERY LEGAL SCHOLAR WHO HAS THOUGHT ABOUT THE POSSIBILITY OF A CONSTITUTIONAL CONVENTION: THE LANGUAGE OF ARTICLE V RAISES INNUMERABLE QUESTIONS OF INTERPRETATION AND OFFERS ALMOST NO ANSWERS.

RELEVANT DEBATE IN THE CONSTITUTIONAL CONVENTION NEARLY 200 YEARS AGO SHEDS LITTLE LIGHT ON THE ANSWERS, AND SINCE THERE HAS NEVER BEEN A CONVENTION ACTUALLY CALLED UNDER ARTICLE V, THERE HAS BEEN NO OPPORTUNITY FOR THE QUESTIONS TO BE CONFRONTED AND ANSWERED. WE HAVE NO TRACK RECORD ON THESE ISSUES. AND YET MORE THAN 30 STATE LEGISLATURES HAVE ACTED OR PURPORTED TO ACT TO ASK CONGRESS TO CONVENE A CONSTITUTIONAL CONVENTION ON A BALANCED BUDGET AMENDMENT.

WITH ONLY 34 STATES NEEDED TO MAKE UP TWO-THIRDS OF THE STATES, IT IS UNDERSTANDABLE THAT THE CONSTITUTIONAL CONVENTION IMPLEMENTATION ACT WAS INTRODUCED IN THE 98TH CONGRESS, AS IT WAS IN THE 97TH. IN HIS INTRODUCTORY STATEMENT, SEN. HATCH SUMMARIZED THE PURPOSES OF THE BILL VERY WELL IN ONE PHRASE: TO "FILL THE INTERSTICES OF ARTICLE V."

NO ONE IN CONGRESS SETS OUT TO DRAFT UNCONSTITUTIONAL LEGISLATION, BUT IN THE CASE OF S.119, THERE IS FAR LESS GUIDANCE THAN WE ORDINARILY ENJOY AS TO WHERE THE LINES OF AUTHORITY END, AND THE POWERS OR PREROGATIVES OF ANOTHER BRANCH OF GOVERNMENT OR ANOTHER FORUM BEGIN.

IT IS THEREFORE ALL THE MORE IMPORTANT FOR US TO SEEK ALL OF THE SCHOLARLY ADVICE WE CAN OBTAIN. WE DID JUST THAT IN THE 96TH CONGRESS IN CONNECTION WITH THE PREDECESSOR TO THE PRESENT BILL, AND THE RECORD OF THE HEARING OF NOVEMBER 29, 1979 IS INDEED A GREAT HELP TO US NOW.

AND YET WE CANNOT, AND SHOULD NOT, REST WITH THAT RECORD, DESPITE THE FACT THAT THE STATE OF THE LAW CANNOT BE SAID TO HAVE CHANGED SINCE THEN. THE VERY PROCESS OF DEBATE AMONG CITIZENS, SCHOLARS, AND ELECTED OFFICIALS HAS SHARPENED OUR INSIGHTS AND CLARIFIED THE DEBATE. A FEW WEEKS AGO I WROTE TO 10 PROMINENT LEGAL SCHOLARS ABOUT THIS LEGISLATION AND THE BROADER TOPIC OF THE LAW RELATING TO A CONSTITUTIONAL CONVENTION, AND WHILE NOT ALL OF THE RETURNS ARE IN, THE INPUT FROM THESE EXPERTS HAS ADDED MEASURABLY TO MY OWN UNDERSTANDING OF THE ISSUES, AND I EXPECT THAT THIS PROCESS WILL CONTINUE.

IF A CONVENTION PROCEDURES BILL IS TO BE TREATED WITH RESPECT IN THE EVENT A 34TH STATE SHOULD ACT SOME DAY IN THE FUTURE -- NOT A DEVELOPMENT THAT I PERSONALLY FAVOR OR WOULD WANT TO HAPPEN -- IT WILL HAVE TO BE THE MOST CAREFULLY DRAFTED LEGISLATION POSSIBLE.

WHILE I SUPPORT LEGISLATION ON CONVENTION PROCEDURES, THERE ARE SOME CONSIDERABLE DIFFERENCES BETWEEN THE PRESENT BILL AND LEGISLATION PROPOSED IN THE PAST. PERHAPS THE MOST WIDELY DEBATED PROPOSAL WAS A BILL INTRODUCED BY SEN. SAM ERVIN IN THE 90TH CONGRESS AND ADOPTED BY THE SENATE IN OCTOBER, 1971.

BECAUSE IT WAS ACTUALLY PASSED BY THIS BODY, THE ERVIN BILL SERVES AS A BENCHMARK AGAINST WHICH OTHER PROPOSALS ARE TO BE MEASURED. THIS IS NOT TO SAY THAT A DIFFERENT BILL CANNOT BE A BETTER BILL, BUT IT SEEMS CLEAR TO ME THAT THE DIFFERENCES DESERVE CLOSE EXAMINATION.

FOR EXAMPLE, THE ERVIN BILL PROVIDED THAT A STATE APPLICATION FOR A CONVENTION MUST BE MADE IN THE SAME MANNER AS PROVIDED FOR THE ADOPTION OF A STATUTE BY THE STATE LEGISLATURE, BUT WITHOUT THE NECESSITY OF REVIEW BY THE GOVERNOR.

THE CURRENT BILL ALLOWS THE STATE LEGISLATURES TO DETERMINE THE RULES FOR THE ADOPTION OF AN APPLICATION RESOLUTION, OPENING THE POSSIBILITY THAT THE RULES WILL VARY FROM STATE TO STATE.

ARTICLE V IS SILENT ON THIS ISSUE, AS IT IS ON ALL OF THE OTHER MATTERS IN QUESTION. BUT I AM CONCERNED THAT IF ANY STATE APPLIES FOR A CONVENTION WITH A FORMALITY SHORT OF THAT REQUIRED TO ADOPT A STATUTE, IT IS VERY LIKELY THAT DOUBTS WILL ABOUND ABOUT THAT STATE'S CLAIM TO SPEAK FOR A MAJORITY OF ITS PEOPLE. THOSE DOUBTS CAN ONLY HELP TO CLOUD AN ALREADY DIFFICULT PROCEDURE OF DETERMINING WHETHER A CONVENTION HAS BEEN VALIDLY SOUGHT UNDER ARTICLE V.

UNDER THE ERVIN BILL, CONGRESS DETERMINES THE VALIDITY OF STATE APPLICATIONS FOR A CONVENTION. UNDER S.119 THE STATES IN EFFECT REVIEW THE VALIDITY OF THEIR OWN ACTIONS.

WHILE NUMEROUS LEGAL SCHOLARS HAVE POINTED OUT THE DANGER OF GIVING THE CONGRESS EXCESSIVE CONTROLS OVER A PROCESS THAT IS DESIGNED TO OPERATE FREE OF CONGRESSIONAL INTERFERENCE, IT IS FAIR TO ASK WHETHER THE ALTERNATIVE OF LEAVING ALL OF THE POWER IN THE HANDS OF THE STATES IN REVIEWING THE VALIDITY OF THEIR ACTIONS MIGHT NOT CAUSE AN EQUAL NUMBER OF PROBLEMS.

UNDER THE ERVIN BILL THE DELEGATES TO A CONVENTION WOULD BE POPULARLY ELECTED BY CONGRESSIONAL DISTRICT, PLUS TWO STATEWIDE. S.119 LEAVES THE METHOD OF CHOICE OF DELEGATES UP TO THE STATES. DELEGATES COULD BE APPOINTED, IF THE STATE SO CHOSE.

IT IS VERY HARD TO ARGUE THAT THE DRAFTERS OF THE CONSTITUTION HAD THE ERVIN SCHEME IN MIND IN ADOPTING ARTICLE V, BUT THAT POINT DOES NOT END THE DEBATE. IT IS NOT POSSIBLE TO SPEAK WITH CERTAINTY ABOUT WHICH MODERN CONSTITUTIONAL INTERPRETATIONS WILL BE APPLIED TO AN ANALYSIS OF ISSUES RAISED UNDER ARTICLE V. THE ERVIN APPROACH ON SELECTION OF DELEGATES CLEARLY NARROWED STATE AUTHORITY, BUT ON THE OTHER HAND IT PROMOTED THE NORMS OF FAIRNESS NOW APPLIED TO ALL OTHER ELECTIONS AND FURTHERED CONSISTENCY IN THE APPLICATION PROCESS.

THE TWO BILLS ALSO DIFFER ON THE ISSUE OF THE KIND OF CONVENTION MAJORITY NEEDED FOR ACTION. THE ERVIN BILL REQUIRED ACTION BY TWO-THIRDS OF THE TOTAL NUMBER OF DELEGATES TO THE CONVENTION. S.119 IS SILENT ON THE QUESTION, LEAVING ITS RESOLUTION TO THE CONVENTION ITSELF. WHETHER OR NOT A TWO-THIRDS RULE IS WISE, IF CONGRESS IMPOSES IT THE CRITICISM WILL DOUBTLESS BE RAISED THAT THE MOTIVE OF CONGRESS IS TO WEAKEN THE POWER OF A COMPETITIVE BODY TO TAKE EFFECTIVE ACTION IN CHANGING THE CONSTITUTION.

THE ERVIN BILL WENT FAR TOWARD MAKING CONGRESS' ACTIONS IN MAKING PROCEDURAL DETERMINATIONS NONREVIEWABLE. S.119 CREATES A NARROW RIGHT OF JUDICIAL REVIEW CONCERNING CERTAIN CONGRESSIONAL ACTION AND LEAVES THE BULK OF THE ISSUE OF COURT REVIEW TO THE COURTS TO DETERMINE UNDER THE CONSTITUTION AND LAWS.

THIS SUBJECT IS ESPECIALLY DIFFICULT AND COMPLEX, AND WE WOULD BENEFIT FROM A REVIEW OF THE PROS AND CONS IN LIGHT OF RECENT SCHOLARSHIP ON THE ISSUE.

THERE ARE MANY ADDITIONAL ISSUES, NOT NECESSARILY REFLECTING STRONG PHILOSOPHICAL DIFFERENCES BETWEEN COMPETING VERSIONS OF A BILL, BUT RATHER REFLECTING DIFFERENT APPROACHES TO PRACTICAL PROBLEMS. THERE ARE MANY HOUSEKEEPING PROBLEMS THAT REQUIRE LEGISLATION TO SETTLE, AND IT IS WORTH OUR EFFORT TO DEVISE ANSWERS TO THESE PROBLEMS THAT ARE BOTH FAIR AND WORKABLE. S.119 DEALS WITH SUCH MATTERS AS TIME LIMITS FOR MANDATORY ACTIONS BY EACH HOUSE OF CONGRESS, WHO SHALL CONVENE THE CONVENTION, ESTABLISHING A QUORUM OF CONSTITUENTS, AND NUMEROUS OTHER MATTERS.

A GREAT DEAL OF WORK AND THOUGHT HAVE GONE INTO THE BILL BEFORE US, AND IT OFFERS AN EXCELLENT BASIS FOR FURTHER DISCUSSION AND, I AM CONFIDENT, ACTION.

WE UNDERTAKE OUR TASK WITHOUT KNOWING WHETHER OR NOT OUR ACTIONS WILL BE CONSIDERED BY THE JUDICIAL BRANCH IN THE EVENT OF SOME FUTURE CONFLICT, OR WHETHER THE COURT MIGHT ABSTAIN ON GROUNDS OF POLITICAL QUESTION.

BUT THE POSSIBILTY THAT OUR LEGISLATION MIGHT NOT BE REVIEWABLE, EVEN CONTRARY TO OUR OWN DESIRES, SHOULD NOT CHANGE OUR MANDATE: FAITHFULNESS TO A CONSTITUTION THAT HAS GUIDED US FOR NEARLY TWO CENTURIES AND WHOSE PROVISIONS WE ARE CHARGED TO INTERPRET WITH AS MUCH CARE AND FIDELITY AS THE SUPREME COURT ITSELF.

PROFESSOR NEIL COGAN IS ONE OF THE 19 SCHOLARS I SPOKE OF EARLIER, AND I AM DELIGHTED HE CAN BE WITH US THIS MORNING. WHATEVER RESERVATIONS HE MAY HAVE ABOUT THE CONSTITUTIONALITY OF PROCEDURES LEGISLATION, HE IS WILLING -- AND I MUST ADD, VERY QUALIFIED -- TO DISCUSS SPECIFIC PROVISIONS OF S.119 WITH THE GOAL IN MIND OF HELPING US TO PRODUCE THE VERY BEST BILL POSSIBLE.

I THANK HIM FOR BEING HERE AND LOOK FORWARD TO HEARING WHAT HE HAS TO SAY ON THIS MOST IMPORTANT TOPIC.

STATEMENTS BY NEIL H. COGAN, PROFESSOR, SOUTHERN METHODIST UNIVERSITY, AND JOHN ARMOR, ATTORNEY

Professor COGAN. Mr. Chairman, I am privileged and honored to be asked by the committee to testify with respect to S. 119. I do hope that I may be of assistance to all Members on both sides of the aisle.

If I may, I would like to submit a written memorandum on S. 119, which you have indicated will be made part of the record.

Senator LEAHY. Thank you.

Professor COGAN. It was written several weeks ago and written with some expedition, because I was informed that the committee was desirous of proceeding apace with this legislation. Expedition notwithstanding, the memorandum does state clearly, if not fully, my views with regard to S. 119.

Rather than speak to the specifics of that memorandum, I would, with permission of the Chair, like to give some overview to the subject of a Federal constitutional convention and congressional and State legislative control thereof, and then I would submit to questions.

I wish to make four points.

My first point really is a note of warning, in the nature perhaps of the Surgeon General's warning. This legislation is not legislation prescribing rules of conduct for citizens; this is legislation prescribing the structure of a constitutional body and the relationships of that body to the State legislatures and the Congress. As such, Congress must be aware—warned, if you like—that what it does may have little impact upon the body that is called into being. Rules of conduct for citizens are likely to be obeyed, and, if not, likely to be enforced by other branches. However, it is entirely possible that a convention will disregard this legislation and, despite the controls included therein, that the State legislatures and courts will disregard the controls and consider the convention's acts as lawful.

This is not a warning to do nothing, of course. Rather, it is a warning to concentrate most closely on that which is most clearly within congressional control or power, and be aware of what is not within congressional control or power.

The second point is about powers under article V, and presumptions about them. The text of article V plainly gives to the State legislatures the power to trigger a convention. It is the State legislatures that make the application.

The text plainly gives the Congress the power to determine whether the requisite number of applications has been received; after a proposal has been made, to determine whether the pertinent mode of ratification is by the State legislatures or State conventions, and, after consideration by the States, to determine whether the requisite number of ratifications has been received.

The text plainly gives the convention the power to propose amendments, in the plural; the text does not plainly give either the State legislatures, through the making of their applications, or the Congress, through its review of the applications, the power to limit the convention's proposing power. Indeed, it seems to me, as I said in the written memorandum, that the words and context of the words lead to the contrary conclusion:

Assuming, as must be conceded by all sides, however, that the text is not completely clear about a limited-subject convention, how should the issue be decided? I argue in the written memorandum that the framers' understanding and the historical understanding accord with the conclusion that neither the State legislatures nor the Congress has the power to limit the convention's proposing power.

But let me ask: assuming the text, the original and historical understandings are not clear—here I don't agree with the assumption, but assuming arguendo—is there some other source or rule to which we should look?

It seems to me that we look to the theory of our frame of government, and that theory tells us that, in the absence of words and understandings to the contrary, that power remains in the people. This, I believe, is an appropriate presumption in the adjudication of our Constitution, and it is particularly apt with regard to amending the structures and relationships of Government and the relationships of the people and their Government.

S. 119 presumes the contrary. It presumes that the State legislatures can limit the subject matter of a convention, can choose the delegates, and, with the cooperation of the Congress, can ratify those proposals.

One of the concepts that becomes very apparent in reading the debates of the Federal Convention was that choice by the State legislatures and choice by the people were viewed as very different methods by the framers. This Senate was deliberately chosen by State legislatures for more than a century; the framers knew how to specify control by State legislatures. Morris, Gerry, and Mason plainly understood that such State legislative control of proposing amendments was removed from the text.

S. 119 puts an inordinate amount of power in the hands of the State legislatures and out of the hands of the people; it tilts the balance of government and people against the people. Most respectfully, it is a radical proposal, a radical presumption.

Before I go on, however, let me say that I do not believe that State legislatures are forbidden to propose or suggest amendments; they can, of course, but they may not attempt to limit the convention to those proposals or those suggestions.

While I do not hope to persuade the proponents of S. 119 to abandon this legislation, I do hope that I can persuade them that at least section 7(a), providing for the appointment of delegates by the State legislatures, is unconstitutional, because it gives to the States, to the State legislatures, control that they were not to have. It is also unconstitutional for the independent but parallel reason that it is now fundamental that general-purpose Federal legislative bodies shall be chosen by popular election.

My third point is about contemporaneousness. Under article V, after applications or ratifications have been received, it is the duty of the Congress to determine whether the will of the people has been expressed. In deciding whether ratification should be by legislature or by convention, it is the duty of the Congress to determine how that will will be most effectively expressed.

While it is for the Congress that receives the requisite number of applications or ratifications to make the final congressional deter-

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mination, it is plainly appropriate for this Congress to provide a benchmark for what period of time is sufficiently contemporaneous to constitute the expression of the will of the people. And it is plainly appropriate for this Congress to provide procedures for the accurate determination of that expression.

It seems to me that in 1984, a period of 14 years, as provided in section 5(a) of S. 119, is not contemporaneous. Fourteen years ago, President Nixon was beginning his second year in office. We were about to invade Cambodia. Wage and price controls were yet to be imposed. ERA was yet to be proposed by the Congress. The Supreme Court had not yet decided whether busing was a constitutionally permissible remedy. If I may be permitted a note of personal reference, my oldest child, who is here, Jacob, was just 7 months old, and my daughter, who is here, Adina, was not yet born.

Senator LEAHY. Time goes by.

Professor COGAN. I am not sure that what happened then is contemporaneous with what is going on today.

Would an application for a convention, general or limited in subject, made in 1970 still be contemporaneous? I doubt it.

As I said in the written memorandum, 4 years, two sessions of a State legislature that meets every 2 years, as mine does in Texas, seems to me to be an appropriate benchmark—not binding on a future Congress, but of valuable guidance.

Importantly, too, it seems to me that when Walter Cronkite can speak to Begin and Sadat on the evening news, as he did some years ago, then the Congress can institute a procedure whereby it can communicate with the State legislatures and determine whether their applications or ratifications are still effective and meaningful. It is very well for the Congress to examine carefully, State constitutional law scholars to examine carefully, the applications or ratifications to determine their meaning and continued effectiveness. But we can do even better. This is far too important a subject to leave to speculation. In communicating with the State legislatures, I would submit that the Congress should include a warning—another Surgeon General's warning, if you like, perhaps a general convention warning—which should say at least that there is the possibility, the possibility, that a convention called will become a general convention. I have been to State legislative hearings, and I believe that the States that have submitted applications believe that they can limit the convention to a particular subject matter. The State legislatures should at least be informed that their limitation may not be effective.

My fourth and last point is about limiting a limited-subject convention to the limited subject matter.

While I believe that the issue of whether there may be a limited-subject convention is justiciable—that is to say, I believe that the courts may decide whether a general convention is the only convention constitutional or whether a limited-subject convention is constitutional too—I am not at all sure that whether a limited-subject convention has remained within its subject matter limitation, is necessarily justiciable.

It is therefore incumbent upon the Congress to keep a limited-subject convention within its subject. If the convention goes beyond

its subject, it acts beyond its jurisdiction, so to speak, it acts without power, unconstitutionally.

Sections 11 (b) and (d) do not treat that kind of action by a limited-subject convention with appropriate seriousness. Those sections provide that Congress may stop a proposal from going to the States only by agreeing to a concurrent resolution. This, it seems to me, is backward.

If Congress and the State legislatures may control the subject matter of the convention, then Congress may also provide that no proposals go to the States until the Congress votes affirmatively that the proposals are within the subject matter limitation, and determines the mode of ratification.

Finally, whether I am right or wrong about justiciability, it is important to have judicial review available to the extent constitutionally allowable, to the extent that the Supreme Court will determine that it is allowable.

I would recommend that section 15 be amended to grant to citizens claims of the kind I described in the memorandum and to remove any prudential limitations on the exercise of jurisdiction.

As the committee is aware, the Supreme Court, in the last decade, has imposed numerous prudential limitations, limitations not required by article III of the Constitution, prudential limitations upon the exercise of Federal court jurisdiction. I would have, in this legislation, a provision that those limitations are removed.

With that overview, I am ready for questions. I thank the committee once again for the privilege and honor of addressing it.

[The following was received for the record:]

Prepared Statement of Neil H. Cogan

This memorandum is divided into two parts. The memorandum discusses briefly the constitutionality of legislation limiting a constitutional convention to a specific subject. On the assumption that such legislation is constitutional, the memorandum discusses in part II the constitutionality and wisdom of several of S. 119's more important provisions.

I. The Constitutionality of S. 119's Limiting a Constitutional Convention to a Specific Subject

Because the issues have been so thoroughly discussed in the literature and because the Senate has previously passed overwhelmingly bills similar to S. 119, this memorandum discusses only briefly the unconstitutionality of its general intent, to limit the subject matter of a constitutional convention called pursuant to article V. Each source of constitutional law which one examines confirms the understanding that an article V convention cannot constitutionally be limited.

The text of the Constitution provides for two modes by which amendments to the Constitution may be proposed. The Congress may propose "Amendments" and, "on the Application of the legislatures," Congress "shall call a Convention for proposing Amendments." The text plainly allows Congress to propose any number of amendments; if parallelism is meaningful, then the text plainly allows a convention also to propose any number of amendments. A convention is called on "the Application of the legislatures," but "Application" does not modify the scope of the "Convention for proposing Amendments." Plainly, a convention thus called should consider the subjects motivating the call; perhaps a duty to consider such subjects can be read in the text. But there is no textual limitation on the convention's consideration of subjects and proposal of amendments.

The debate of the Framers shows that Madison's proposal was that "on the application of two-thirds of the Legislatures of the

several States, [Congress] shall propose amendments," 2 M. Farrand, The Records of the Federal Convention 559 (1937) [Sept. 10, 1787]; and that Madison's proposal was amended "as to require a Convention on application of 2/3 of the Sts." Id. at 629 [Sept. 15, 1787]. While the debate is otherwise unenlightening, it does reveal an intent to shift the proposing function from the State legislatures to a convention. Allowing the States to control the proposing function of a convention (by limiting the proposals that it may make or even the subject matter that it may consider) subverts the shift in functions recorded in the debate.

The debate is enlightening on another point. Throughout the debates, the Framers made clear their distrust of having only the Congress authorized to propose amendments. So distrustful were they that it is reasonable to conclude that the Framers wished to have the Congress exercise as little control as possible over the proceedings of the convention. Plainly, to allow the Congress to control the proposals or subject matter of a convention subverts that intent.

Beyond text and specific debate, there are other compelling reasons for rejecting limitations on a convention to a specific subject. By the manner in which the Framers both debated and proceeded in their own convention, it is apparent that they understood that conventions were authorized to consider all subjects and propose any amendment. Except for equal suffrage in the Senate, the Framers understood that they were authorizing a mode that could affect the fundamental structures and relationships of the Constitition;[1] allowing the States or the Congress to control

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1. E.g., Farrand notes the following:

> In the margin of his copy of the draft of September 12, Mason had written:
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> > "Article 5th -- By this article Congress only have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people." 2 M. Farrand, supra at 629 n.8.

the subject matter of a convention subverts that understanding.

Importantly too, there is an historic understanding of the two modes of amending the Constitution. The Congress has proposed several dozen amendments, twenty-six of which have been ratified. These have been specific rather than general revisions of the Constitution, proposed sporadically as conditions have warranted. By contrast, until the late nineteenth century all applications for a convention were applications for a convention to make general revisions in the Constitution. Since then, however, there have been applications for specific-subject conventions, although the requisite number of applications has never been received. This history shows at least a century's understanding that the Congressional mode of proposing amendments was intended for specific revisions, and the convention mode for general revisions. Further, this history shows a two-century understanding that the Congressional mode is structurally best suited for specific revisions and should be reserved for such, and that the convention mode is structurally best suited for general revisions and should be reserved for such. It is inconsistent with these historical understandings for the people to meet in convention only for the purpose of ratifying what their legislatures have already proposed.

For these reasons, I believe that Section 2 of S. 119, and the entire bill for that matter, is unconstitutional. Section 2(a) unconstitutionally purports to limit the bill to a "constitutional convention . . . for the purpose of proposing one or more specific amendments . . . ." And Section 2(b) specifically excludes "applications requesting a convention for any other purpose . . . ." For these reasons too, I believe that Section 6 (Congress' duty to call a convention regarding a "general subject"); Section 10 (the convention's duty to limit itself to the prescribed "general subject"); and Section 11 (Congress' control of convention proposals to the prescribed "general subject") are unconstitutional too.

II. On the Assumption that Limiting a Constitutional Convention to a Specific Subject is Constitutional, the Constitutionality and Wisdom of S. 119's Other Provisions

A. Contemporaneousness

Applications for a constitutional convention, like ratifications of constitutional amendments, must reflect the will of the people of the United States. In our constitutional system, we have concluded that the people's will is expressed only when the expressions are sufficiently contemporaneous. See Dillon v. Gloss, 256 U.S. 368, 374-76 (1921); Coleman v. Miller, 307 U.S. 433, 453-54 (1939). Whether applications or ratifications are sufficiently contemporaneous depends of course upon the conditions within the nation, including political, economic, social and even technological conditions. It is proper for a Congress prior to the receipt of applications or ratifications to examine those conditions and make a determination (really a prediction) about what period of time will be sufficiently contemporaneous. If at the end of that period the requisite number of applications or ratifications has not been received, it is proper for another Congress to determine (predict) whether an extension of the period of time would be consistent with contemporaneousness. Regardless of whether the period is extended, when the requisite number of applications or ratifications is received, it is the duty of the Congress that receives them to determine finally whether the entire period has been sufficiently contemporaneous.

In view of the above, Section 5(a) is problematical. It seeks to preserve pending applications (presumably for a Balanced Budget Convention) for a period of up to fourteen years. It is difficult to believe that in the last quarter of the twentieth century, applications spaced over a period of fourteen years are sufficiently contemporaneous. In a period when all legislatures meet at least once every two years; when the Congress or any State legislature may communicate, if it wishes, with every State legislator in the nation instantaneously; when national debates may be viewed by the vast majority of the electorate, applications

made during a fourteen-year period are unlikely to reflect a unitary expression of will. This is especially true in a time when important beliefs and attitudes shift in relatively short periods of time. While Section 5(a) is not per se unconstitutional, it is likely to be unconstitutional in most foreseeable applications, and it is certainly misleading to the States that may rely upon it. Therefore, two suggestions are submitted.

First, the word "seven" on page 4, lines 18 and 19, should be stricken and the word "four" inserted; the sentence beginning with "An" on page 4, line 25, and continuing through "greater" on page 5, lines 4 and 5, should be stricken. These amendments would indicate the current Congress' belief that four years (or two general legislative sessions in States whose legislatures meet once every two years) is generally a sufficiently contemporaneous period. This will not bind a Congress that receives the requisite number of applications, because that Congress will make the final congressional decision whether four years or any extension thereof was a sufficiently contemporaneous period. But Section 5(a), as so amended, will at least serve as a benchmark for what in today's America is considered a sufficiently contemporaneous period.

Second, the word "that" on page 6, line 4, should be stricken and the word "whether" substituted; a new sentence should be inserted in line 5 after the sentence ending with the word "subject." The new sentence should read: "In order to fulfill its duty, either House of the Congress may request each State from which an application has been received to inform the Congress whether the State's application, including the general subject included in such report, continues to reflect the will of the State legislature."[2] This amendment would provide Congress with

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2. Of course, some State legislatures may not be in session. But the importance of a constitutional convention is sufficient to compel a special State legislative session if the State truly wishes a convention.

an accurate method of determining contemporaneousness.[3] Legislatures that had recently made an application presumably would need little time to deliberate and reply. Legislatures that had not recently made an application would need some time, sixty days say, but if the application still expresses the will of the legislature a prompt reply should be no burden. Indeed, it seems to me to be no burden for a legislature annually or biennially to re-make its application until a convention is called; legislatures pass recurrent resolutions for far less important matters.

B. Representation

Neither article V nor the debate of the Framers speaks to the manner of selection of delegates to a convention. Moreover, the Supreme Court has consistently refused to recognize a right of citizens to elect members of State legislative bodies. Harper v. Virginia Board of Elections, 383 U.S. 663, 665 (1966). Nonetheless, I believe that popular election of delegates to a federal convention is constitutionally required, and appointment of delegates, as provided in Section 7(a), is unconstitutional.

First, as noted above, the Framers rejected Madison's proposal that the Congress transmit to the States those amendments proposed by two-thirds of the States, and substituted a proposal that the Congress must call a convention for the proposing of amendments upon the application of two-thirds of the States. To allow the States to initiate a convention (and, assumedly, to limit its subject matter) and to allow the States to choose the delegates too, would revive the rejected Madison proposal and allow the States to use a convention as a rubber-stamp of their own proposals. Second, the Framers' intent notwithstanding, at least since the Seventeenth Amendment and at least regarding the federal system the popular election of general-purpose legislative bodies has become a fundamental principle of our constitutional structures and relationships. The application of this principle

3. It is an accurate method also of determining the effectiveness of any repeal of application.

to the third great legislative body created by the Framers would seem unchallengeable. Therefore, it is suggested that the words "Each State shall appoint" on page 7, line 2, be stricken and the words "The people of each State shall elect" be substituted.

While neither the text nor the debate of the Framers again speaks to the number of delegates and the weight of their votes, the Court has said that equal representation for equal numbers of people is a "basic principle of [our] representative government . . . ." Reynolds v. Sims, 377 U.S. 533, 567 (1964). There is no reason to suppose that this principle should not apply to a constitutional convention; article V amply protects the States by requiring ratification of any amendment, however proposed, by three-fourths of the States.[4] Section 7(a), in providing that the number of delegates for each State shall equal the whole number of Senators and Representatives to which such State is entitled in Congress, is unconstitutional when read in combination with Section 9(a), providing that each delegate shall receive one vote. Therefore, it is suggested that the words "Senators and" on page 7, line 4, be stricken.[5]

Finally, while it may not be unconstitutional for Section 7(a) to prohibit Senators and Representatives from serving as delegates (and, simultaneously, holding office in the federal legislature), it seems terribly unwise to disqualify from service persons who have so much expertise. Many of the delegates to the Philadelphia Convention were members of the Continental Congress and, needless to say, served so ably that we have been thankful ever since.

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4. There is no reason to suppose that the Great Compromise was intended to apply to a convention under article V.
5. The Congress might consider the wisdom of granting the District of Columbia and the several territories and protectorates a number of non-voting delegates.

C. Procedures

The Congress has no power to control, by Section 9(c), the length of a convention's proceedings. How long a convention shall study and debate, how deliberate it shall be, are matters vital to the convention's process. To allow the Congress, of which a convention was intended to be independent, to control such vital matters violates the Framers' intent. Therefore, it is suggested that Section 9(c) be stricken or be made hortatory only.

D. Ratification

On the assumption that the States may limit the subject matter of a convention, then a convention acts beyond its jurisdiction -- i.e., it acts unconstitutionally -- when it proposes an amendment unrelated to the general subject matter demanded by the States. Nonetheless, Sections 11(b) and 11(d) provide that all amendments proposed by a convention shall be transmitted to the States unless both Houses of the Congress otherwise direct. See, especially, page 10, lines 5-12. While such provisions would be perfectly acceptable were there a general-subject convention, they encourage unconstitutional proposals by a limited subject-matter convention. Thus, a Balanced Budget Convention might submit an anti-abortion proposal; under Sections 11(b) and 11(d), unless both Houses of the Congress disapproved, the anti-abortion proposal would go to the States. Therefore, it is suggested that Sections 11(b) and 11(d) be rewritten to provide that the Congress shall decide, within 30 days of its receipt of any proposed amendment, whether any such amendment is within the general subject matter to which the convention was limited and, if both Houses agree that the amendment is within the general subject matter, then the Administrator of General Services shall transmit such amendment to the States.

Section 11(d) provides that Congress shall not prescribe a period of ratification of less than four years; Section 12(a), by omission, seems to imply that Congress may not extend the period

for ratification. As discussed above, the issue of the contemporaneousness is ultimately for a future Congress. The determination of what period will be sufficiently contemporaneous is for the Congress that receives the proposed amendment and what period has been sufficiently contemporaneous is for the Congress that receives the requisite number of ratifications or the Congress that considers whether to extend the period for receiving the requisite number of ratifications. However, as discussed above, I believe that the four-year period prescribed in Section 11(d) is a reasonable benchmark in today's America. It is suggested, however, that Section 12(a) be amended by inserting after the word "time" on page 11, line 16, the words "period or periods." This would indicate that there may in some circumstances be an extension of the period first specified by the Congress.

Section 13 provides impliedly that States may effectively rescind ratification and may effectively ratify after rejections. As with contemporaneousness, the effectiveness of such actions is for a future Congress. I am troubled that this Section will encourage States to treat ratifications or rejections lightly, on the belief that their actions may readily be undone. I would at least add to Section 13 a new subsection (c): "The effectiveness of any such rescission or ratification shall be determined by the Congress that receives the requisite number of ratifications. In order to make such determination, the Congress may request each State from which a ratification has been received to inform the Congress whether the State's ratification continues to reflect the will of the State legislature or convention, as the case may be."

E. Judicial Review

Section 15(a) provides that the States have a claim should Congress not act within the time periods provided in Sections 6 and 11. Without attempting to answer what issues are justiciable, it is suggested that citizens too deserve a claim. They deserve a claim at least to challenge the constitutionality of a specific-

subject convention; the receipt of the requisite number of applications for a convention; the proposal of amendments beyond the general subject matter of a specific-subject convention; the receipt of the requisite number of ratifications of amendments. Furthermore, regarding all such claims, Section 15 should specifically remove any prudential limitations on the exercise of jurisdiction. Provision should be made for a special three-judge court to hear such citizen claims, with direct appeal to the Supreme Court.

Respectfully submitted,

Neil H. Cogan
Southern Methodist University
School of Law

Senator LEAHY. Thank you. We appreciate your being here, especially so ably backed up by your son and daughter there, and the committee welcomes them to the hearing.

Why don't we hear from Mr. Armor now, and then I will have questions for both of you.

If you have a statement, it will be made part of the record; if not, go ahead.

STATEMENT OF JOHN ARMOR, ESQ.

Mr. ARMOR. Senator Leahy, it is a privilege to be here. My notice from staff that it might be worthwhile for me to come was less than 2 days ago, so I do not have a written statement.

Senator LEAHY. You have to understand that also sometimes happens even to Senators, that kind of notice. But, you see, you also, as a constitutional scholar and one who is obviously interested in the workings of the Congress, must realize that Senators are but mere constitutional impediments to the staff totally running things here, and a constitutional impediment of diminishing importance in that regard, diminishing in direct inverse ratio to the increase in the size of Senate staff.

So please feel free to give your statement.

Mr. ARMOR. First of all, I am in the middle of a 50-page monograph on article V, "The Right of Peaceable Change," which will be published by a Washington foundation, and I will make copies of that available for the record.

Senator LEAHY. Thank you.

Mr. ARMOR. I am not about to summarize that this morning.

With regard to your opening remarks, I did have the privilege of flying in a snowstorm in Vermont to testify to your legislature, when this matter was before them.

Senator LEAHY. That was last July, wasn't it, that snowstorm? [Laughter.]

Mr. ARMOR. Well, I wrote a very complimentary article in the local press about the Vermont Legislature, and, if you haven't seen it, Senator, I would like to give it to you, because I really liked and enjoyed what happened there.

Senator LEAHY. Thank you. I would like to see it. And I am delighted to hear you say that the Vermont Legislature—I am very, very proud of it; we are, as you know, a very small State, half a million people, and we have a legislature that is far, far better than the size of the State would seem to indicate. I think we are very fortunate. It's a citizen legislature and what Congress once was, and what many of us wish could return to being. It's very open, very honest—and I know of no State where there is so much intense interest and awareness of what the legislature does than in Vermont during the 3 months or so each year that it sits.

And, as I say, a very, very open, very accessible legislature, as our whole State government is. But I am delighted to hear that you had a good experience there and I will look forward to the article.

But please go ahead with your comments.

Mr. ARMOR. Many times in our history, beginning about 20 years ago, the point has been made that there should be a conventions procedures bill and that it ought to be considered when there is no

subject on the table, so that the merits of the bill do not get tangled up in the merits or demerits of a specific proposal.

Now, that is abstract; in the real world it is only when urgency pushes us that such bills are considered, and therefore we consider these bills when there is an amendment underfoot.

But, to the extent possible, they should be divorced.

Now, I read the actions of the original Convention and its record somewhat differently than Professor Cogan. There were three changes in what the Constitutional Convention in Philadelphia wanted to do with article V.

The first time they preliminarily passed it, the Congress had no role whatsoever; it was purely a State matter—every amendment would have to come from the States. Then they switched it to a form in which amendments would be proposed by Congress but not by the States; and then their last step, as asked for by George Mason of Virginia, was to allow both routes.

And I read the history—and as they say, in the Federalist Papers—that apparent errors in the Federal Government could be corrected as they were perceived, either by the Congress or by the State legislatures. And in their public writings and their private correspondence, I think the framers made it clear that these are parallel rights, that Congress may make a major change—Congress could tomorrow, if it cared to, propose the abolition of the Supreme Court or the repeal of the first amendment; I never expect it to do any such thing—but it has that power. So it can propose major change or minor change. And I suggest that the framers intended——

Senator LEAHY. Don't be too confident the Congress won't propose that; I mean, if you read the court-stripping bills of the last year, it's being proposed in a number of different parts every day.

But go ahead.

Mr. ARMOR. Well, let us distinguish between what an individual Member of Congress in a moment of pique might suggest and what would ever pass by a two-thirds majority of the floor of either House.

Senator LEAHY. That's why I worry about the court bills—they are passing—a number of them could pass very well with 51 percent.

But go ahead.

Mr. ARMOR. But two-thirds is bigger. Anyway, Congress, in essence, is a continuous constitutional convention; it can propose anything it wants. And it has used that power very sparingly. But it has it, as a full-dress matter.

If the framers were right in saying these were parallel constructions, then the States have the same range of possibility: they could say, let us have a general convention. They are not saying that.

And the main point I would make here is that the fact that the States possess the power to require the calling of a new Philadelphia convention does not mean that they are required either to do all or nothing, that they must either compel a general convention, in which there are no holds barred, or they can do nothing. If they have the same rights to suggest amendments to the Constitution as does the Congress itself, then they must have the power to use less

than 100 percent—to say we are going to use 2 percent, we are going to propose that a specific subject matter be dealt with.

I think that is in accord with the framers' intentions, but it is also in accord with our history.

The suggestion is made that the second half of article V has never been used before; in fact, it has been used twice. It was used successfully in 1912 to obtain the 17th amendment to the Constitution, and it was used unsuccessfully 18 years ago with respect to the Dirksen amendment. But in both instances the States put out limited conditional calls for a convention.

Now, I agree with Professor Cogan that Congress does not have the right to materially or substantially impede the States' use of the second half of article V, because the framers put it there to deal with the problem where the State saw it and Congress didn't. However, I disagree with him on the conclusion that the States cannot limit the subject matter. For instance, if you have a legal right across your neighbor's property, you may claim it in toto or you may say to him if you allow me to share your driveway, I won't claim the right, you may condition your use, it's your right.

Senator LEAHY. What happens if half the States make a limited call, for a specific limited call we want a constitutional convention solely on a balanced budget issue, or any other issue, and the other half just make it general and we want a constitutional convention?

Mr. ARMOR. That is part of what a procedures bill will deal with.

Senator LEAHY. Yes, but do we have, in your estimation, under those circumstances, the requisite two-thirds?

Mr. ARMOR. Yes, I think there is a clear answer to that question, and that is that if States may limit—and I think they can—and this bill allows them to limit and recognize their limitation—then Congress only counts as part of a 34, those that match together, and a general call would include balanced budget or any other specific subject.

So you could match the general and specific, but you could not match, for instance, a call concerning prayer in schools with a call concerning balanced budget, because they don't relate to ech other. And if you could, we would be required to have a convention today—and we are not, no Member of Congress has suggested that, and no scholar has suggested that.

A limited call can only be matched with others of kind, a general call is a wild card.

Senator LEAHY. Well, then, are you saying in that case that you would go back to whichever State had the most limited call, and that would really set the standard, provided the others could somehow be interpreted to have the—the most limited one is sort of a lesser included call?

Mr. ARMOR. Right, you have to have 34.

Senator LEAHY. Let's follow this to the extreme. Let's say one State were to call for a constitutional convention on a balanced budget, requiring the whole issue to be determined within 1 week of the convening. Then you get another 15 that call generally for a balanced budget, however they do it, and the others call for a constitutional convention. Are you saying that then if we meet and the most limited one is required to make your number, that they can only meet for 1 week?

Mr. ARMOR. No.

Senator LEAHY. Why not? Wouldn't that be logical?

Mr. ARMOR. The actual operation of the convention is largely a matter for the convention itself.

Senator LEAHY. But then you no longer are keeping faith with that lesser included State.

Mr. ARMOR. Yes, we are, because all the Constitution says is the calling for a convention, and if limitations apply—let's assume 33 States have said let's have a general convention, and a 34th State says we want a convention on subject X.

Senator LEAHY. Are you limited to subject X?

Mr. ARMOR. To my view, you are limited to subject X, because you have got to have 34, and that is the only way you get 34.

Senator LEAHY. Well, then, let's turn it around the other way. Suppose those 33 had said we want a convention but only to consider the whole Constitution open for amendment. Now, can that limiting 1, that 34th one, really be counted in that case?

Mr. ARMOR. Well, the first one is not a limitation. To say everything in the world is included, but we restrict it to that subject——

Senator LEAHY. No, a very specific limitation, saying we want a constitutionaI convention but only on the basis that we be allowed to amend any part of the presently existing Constitution, or offer amendments to it, and our legislature is voting for it only on the basis that we are voting for our unlimited constitutional convention.

How can they then be limited by the 34th one?

Mr. ARMOR. All right, in the present vacuum, that might cause a problem, but this procedures bill, and the others which I've seen, on this particular point I think are in agreement. In other words, this one states at the beginning it applies only to limited convention calls. So if you pass a bill such as this to fill the constitutional vacuum—and I don't use that as a negative comment, our Constitution is well written in setting up a framework but not specifying so many details, as some State constitutions, you know, do.

So I think Congress has the power to act in this area, and if it passes a bill such as this, the problem you are posing disappears, because the only thing you can count to reach 34 to call a limited convention under this bill is 34 States who do in fact say we want this subject addressed, whatever that subject may be.

Senator LEAHY. So, then, under that, you would not count those that just asked for a general constitutional convention?

Mr. ARMOR. That's right, but that is an academic point, because the States are not calling for a general convention.

Senator LEAHY. Well, some have.

Mr. ARMOR. Not in recent years, and certainly none on the present subject.

Senator LEAHY. None of the 30 or 31 presently before us—or 32—have called——

Mr. ARMOR. There are 32 now, and they all use the language "for the sole and express purpose of * * *," and I think it is 17 of them that go on further and say this call is null and void if there is any effort to have the convention go beyond this subject.

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By and large, I agree with the text and the purposes of S. 119; though it is not exactly what I would write if I were sitting down to write it myself. I would like to address just a few specific points.

One concerns the period of time during which calls for a convention remain open. First of all, we look to our history, and at the time of the passage of the 17th amendment, as you may remember, Senator—not personally but from the history books——

Senator LEAHY. I was born in 1940, so give me a break.

Mr. ARMOR. I was testifying before Senator Goldwater about 1 month ago and I made a quick, carefully qualified reference, and he made a joke of it.

Senator LEAHY. Senator Goldwater is 31 years older than I am. Go ahead.

Mr. ARMOR. The history of the 17th amendment shows that 31 States—the target was then 32—called for a limited convention for the purpose of an amendment to make the Senate elective, but they did so over a period of time from shortly after 1893 up to 1912. And finally, in 1912, the Senate of the United States chose the lesser of two evils and wrote the amendment itself, and it was ratified within 1 year.

My point is that the span of time during which the State calls occurred then was, I think, about 11 or 12 years. But there was no serious question that the States meant what they were doing and in fact that was what caused Congress to act.

I have no objection to a bill, as this one does, that sets up 7 years as far as a future proposition, telling the States now these are the ground rules under which you will operate.

I do have serious problems if the ground rules are made retroactive, so you say to a State which has acted in a vacuum, but which has followed the historical example, now we are not going to recognize what you did. By all means—and this has happened in ratification process, originally amendments had open-ended ratification—more frequently, we have adopted, and there is no magic to it, and it is not in the Constitution, but it is logical to set a limit of 7 years on ratification. And that seems to be a workable period of time.

All I am suggesting is: It should not be retroactive.

Now, on the question of the election of the delegates to a convention, section 7(a) parallels the language in the Constitution under which Presidential electors are chosen; the Constitution says "appoint," and in fact, interestingly enough, there is no requirement that the Presidential electors be democratically selected nor any requirement that they be statewide, winner take all versus district. And therefore I think 7(a) as written is legitimate.

However, I think there is a much more democratic view among the people of the United States—with a small "d"—today than there was 200 years ago, and that therefore it would not be either unusual or impermissible for Congress to say all of the delegates shall be elected, and elected by congressional or senatorial districts. That was done in previous proposals; it could be done again.

I don't think it is required, because the Constitution allows the election of the President to go under the language of "appoint," but I do think it might be desirable.

Dealing with the question of what Congress does, let's assume that a convention occurs and let's assume that it makes its submissions back, and then it is, under the Constitution, the business of Congress to specify ratification. And the question is: Should the proposals of the convention go out for ratification unless Congress says they are defective, under the procedures, or should the contrary be true, that it takes a positive act by Congress in order to send them out?

Let me use this analogy. We have a presumption in our system of government that any organ of government is acting properly until and unless, under the checks and balances, it is determined to the contrary. For instance, any law passed by Congress is deemed to be constitutional until and unless the Supreme Court, by a positive act, says we find this to be an unconstitutional bill.

I would consider it extremely inappropriate for it to be the contrary, that every bill passed by Congress is unconstitutional until a majority of the Supreme Court rules in favor of it.

And that, I suggest, is the distinction between my fellow professor's suggestions and my views in section 11 of S. 119. The way it is set up here, what the convention does is presume to have followed its mandate, and therefore to be submissible for ratification, unless the Senate and House decide that it has violated its mandate.

And I think that is the way it should be.

I don't believe it is a major difference between one and the other, but I believe logically the present framework is right.

There is—and I didn't notice this until the hearing began—one clear unescapable unconstitutionality in this proposal, and that is in section 15 where it allows original action in the Supreme Court.

As you know, Senator, from your legal background, and as every member of this staff does, the critical first case in the Supreme Court was *Marbury* v. *Madison,* which for the first time established that the Court could strike down laws as unconstitutional. And the reason it did so in that case was that the Congress had attempted to expand the original jurisdiction of the Supreme Court. That was the reason for the result in *Marbury.* And that is exactly what is done in section 15.

But it is easily solved. The pattern used in the Federal Election Funding Act, where the judicial review begins at the lower level but is specified to be accelerated and to take precedence on the calendar so that it can quickly come to the Supreme Court for resolution, should be inserted in section 15 rather than an attempt to bring the case directly into the Supreme Court.

And, as I said, I didn't notice that until about 20 minutes ago, but it jumped off the page. Under *Marbury* v. *Madison,* that language is unconstitutional.

By and large, I think that this is a good bill. As I say, it is not exactly what I would write from a theoretical standpoint, but what Congress does is not in a theoretical context. The Members here have to consult with each other and there are of necessity differences of opinion, and therefore I view this as a good bill overall, and welcome any questions.

Senator LEAHY. Thank you. What about applications limited to the specific language of a balanced budget amendment, if some of

the States call for a convention to consider and then lay it out specifically the language of a balanced budget amendment?

Is the convention then on this sort of lesser included theory—is a convention limited to that specific language?

Mr. ARMOR. Here I think there is a clear answer, and it's no, and that is the framers understood that Congress could pass a specific proposed amendment, that the Senate could pass its version, the House its, and they would have a conference committee.

But there is no such thing as a conference committee of the States, there is no way that specific language passed in Nebraska could be matched to specific language in Illinois and eventually add up to 34.

But that is what the convention therefore does.

Senator LEAHY. Does that mean that those applications don't count?

Mr. ARMOR. Oh, no.

Senator LEAHY. But if the Vermont Legislature were to specifically say we want a constitutional convention to consider and vote up or down a specific balanced budget, does that mean then that the debate, vote, the will of the Vermont Legislature in making that call goes for nought?

Mr. ARMOR. First of all, no State has done that. Several States have said: "here is the text we want Congress to pass." But they have all said in the alternative—"and if Congress doesn't act—then we want a convention on this subject."

So no one of the 32 States has said here is the language that we want the convention to pass, some have said here is the language we want Congress to pass—but that is a separate question.

Senator LEAHY. We still come down to a question where we have a real lack of uniformity. I am still troubled figuring out how you get to that lesser included call. I don't have the text before me of each one of them—I don't pretend to have them all memorized—but just in doing a scanning of them in preparation for these hearings, I am struck by the differences in the calls from State to State.

Mr. ARMOR. Well, I have read all 32, and, like you, I haven't memorized them. I think a fair reading of them is that they all concern the balanced budget amendment.

Now, here is the danger, and this is why the procedures bill is important: back in 1912 the Senate didn't want to be democratically elected, it fought that amendment tooth and nail; and there was variation in the calls for a convention which were passed then.

What happens if Congress, because it doesn't like the subject—never mind today's subject, let's go back to the subject 70 years ago, or 70 years in advance when we don't know what it will be—if Congress doesn't like the subject, and it nitpicks the calls, what happens? It defeats, it avoids, it turns into a dead letter the second half of article V.

So there has to be a fair reading that the subject matter is the same, not that word for word it's the same, because there would never be such concurrence.

Senator LEAHY. What about us passing a bill inviting specific language applications in the future?

Mr. ARMOR. Then you are dealing with the problem of how you get together a conference committee of 50 State legislatures, actu-

ally involving the Senate and the House in 49 States and a unicameral Nebraska Legislature?

So you've got 99 bodies involved in setting up that language. What are the odds that they will ever agree on any language? Effectively nil.

And the framers knew that. That is why, under the second half of article V, a convention is required. That is the drafting joint committee, as it were, of the States, because they don't have one.

In other words, the Congress is used to the idea of having different language in the House and the Senate, appointing Members to sit down together, work it out, and that's that.

There is no such process among the States, and there never can be. That is why there must be a convention, because that is where you get the specific language. Without that, you might as well just tear out of the Constitution the second half of article V.

Senator LEAHY. Professor Cogan, let me ask you a question. You suggest to make the effective life of a State application 4 years instead of 7. You cite *Dillon* v. *Gloss* which itself had a 7-year period. Most of our amendments proposed by Congress have a 7-year ratification period.

Why 4 years?

Professor COGAN. Originally, as was just mentioned, most amendments, most proposed amendments, did not have any time limitation. Then the Congress began to include limitation—7 years, as you mentioned, was the standard. Recently, with regard to the ERA, Congress even extended the original 7-year period.

The function of the Congress, the clear function under article V, as I said earlier, is to determine what constitutes the contemporaneous expression of the will of the people; 7 years may have been a period that was once generally agreed upon by the Congress and by the country. I think things have changed, and I think 4 years is a better benchmark today.

But 4 years would only be a benchmark if my suggestion were adopted; it would not be binding upon any future Congress. I don't think this Congress can bind any future Congress, and a future Congress could determine that 4 years is not enough and that 6 years or 7 years or 10 years is better, or that 4 years is too much perchance and 2 years is better.

It just seems to me that in 1984, as many people have suggested—and I agree with them—that two sessions of a legislature that meets every 2 years is enough time to constitute the expression of the people's will, and that once you go beyond that, given the changing perceptions and the changing views of the legislatures of the country, and the people, that more than 4 years is no longer contemporaneous.

But whether one settles on 4, or 6, or 7, it seems to me that a bill which says 14 years goes clearly beyond the pale, as I tried to indicate earlier.

And if I could just say one more thing. It was suggested by Mr. Armor that not to recognize applications that were made 7 years ago, coming on 8 and 9 years ago now, is to change the rules. To the contrary, it seems to me, that with regard to this kind of important subject matter, Congress enforces the rules when it requires that the States that made applications 8 or 9 years ago reaf-

firm their applications; RSVP again; say whether they still mean it. It seems to me that with regard to calling a constitutional convention that it is in the interest of the country to ask the States to tell us once again whether they want this particular convention.

Or, with regard to your questioning of Mr. Armor about the subject matter of a convention—how limited it shall be, what the text shall be, and so on—if the Congress should submit a particular subject to a convention, why not first submit to the States calling for a convention what the Congress determines is the lesser included subject matter and ask whether this is the subject matter for which they are applying?

Senator LEAHY. You said that delegates to conventions should be popularly elected if the process is to be fair and just, and that is a question that is a good public policy argument—but is there anything that requires that in article V?

Professor COGAN. I should, in responding to the Senator from Vermont, be careful with regard to proportional representation; clearly, Vermont would not be favored by my suggestion.

Article V does not speak to that subject. The debates at the Federal Convention, as I guess everyone learns at some time during one's life, resulted in a great compromise, and the result of that great compromise is the fact that this Senate has representation in equal numbers from each of the States. There is no indication whatsoever, of course, that that——

Senator LEAHY. Some of us like to think that just simply reflects the basic worth of our people—that's terribly self-serving. Go ahead with your statement.

Professor COGAN. Actually, my own view is that the framers in the end did agree that the interests of some districts—and Vermont, in a sense, is one district—deserved greater influence than the interests of other districts of equal numbers—but that, as you say, is another subject.

But going back to the question. There is nothing in the debates to indicate that the great compromise was to apply to the convention. So, the debate leaves us, and the text leaves us, without an answer.

But I think the answer perhaps is supplied, as I indicated earlier, by another source. I think over the course of time we have concluded that the framers' compromise is no longer the way we wish people's interests to be represented in this country. In the Senate we have kept it, and kept it perhaps for good reasons, but with regard to other legislative bodies, both at a State and at a Federal level, we have not. It seems to me that part of that notion that has become fundamental is that people should be represented equally.

Senator LEAHY. But if you do that in this day as a practical political matter, doesn't that almost guarantee that small States, very small States, are going to hesitate a long time before they call for a constitutional convention, knowing that the checks and balances which they now have at the Federal level only in the Senate would be wiped out entirely in a constitutional convention. A lot of small State power is going to be diminished anyway in a constitutional convention, based on the number of Representatives and Senators, because, to use Vermont and California as an example, that still

makes something like a 45-to-3 ratio. But what you are urging would make it 45 to 1.

Won't the small States be a tad hesitant of those circumstances?

Professor COGAN. Well, in terms of the Senate of the United States, article V does prohibit equal State representation from being changed.

Senator LEAHY. No; I understand that—article V makes it very clear that you can't do this to do away, in effect to do away with the way the Senate is selected. Not do away with the two votes.

But what I am saying is that you are diminishing representation in a constitutional convention. I mean, at this point, if you are a little tiny State, you are a little tiny State when you get to the constitutional convention. The Constitution cannot be amended to do away with your Senate representation. Every State is still going to have two Senators. But as far as the constitutional convention is concerned, there is nothing whatsoever that gives any level of equality from State to State; it would be purely based on, in your estimation, population.

Professor COGAN. That's right. Certainly the bill, as presently proposed, gives Vermont and other small States 2 more delegates, so they get 3 delegates to California's 40-odd. But one should not forget, however, that any proposal would still have to be ratified, whether by State legislatures or by conventions.

And those ratifications by legislatures or conventions would have to command three-fourths of the States, so that the small States would still have the opportunity——

Senator LEAHY. That's where they get their shot.

Professor COGAN. They would have their protection there.

Senator LEAHY. Mr. Armor, do you have any different feelings on that?

Mr. ARMOR. No, I was agreeing exactly with the last point you made, and that is the States count as States in the ratification process, and in any political process—and amending the Constitution is a political process in the broad sense—when you begin, you have to pay attention to the last gate you have to jump. And the last gate concerns the States, and that is what gives Vermont, and Delaware, and Alaska, and the other small-in-population States their impact.

Senator LEAHY. Let me ask a question of both of you. In my opening statement I went down through the differences between the Ervin bill and S. 119. One was the Ervin bill's requirement that amendments be proposed by a supermajority vote of the convention.

Do you think the Congress has the constitutional authority to impose a supermajority voting requirement on the convention?

Professor COGAN. I think not. I think the Congress does not have control over the deliberative function of the convention, and clearly requiring a supermajority is one of the most powerful means of control.

Mr. ARMOR. I agree that it is—well, I don't think it is flat out, but I think it's questionable whether Congress can tell the convention what its internal procedures would be.

But as a matter of desirability I think a supermajority is excellent, for two reasons: First of all, it means that anything that

comes out of the convention was generally and fully agreed to, as opposed to sneaking or squeaking by; and, second, a 51-percent rule raises the possibility that the convention might blow up on irrelevant issues and fight it out and there would be a great deal of blood-letting and a general national embarrassment, whereas a supermajority rule does mean basically it will stick to its knitting.

Professor COGAN. It seems to me that——

Mr. ARMOR. Which I think is structurally very, very important.

Professor COGAN. It seems to me that you have to trust the convention once it is in being. The framers themselves were unhappy with slim majorities. During the first part of the convention, many proposals that small States aid not favor were being passed by 6–5 votes. And I think the framers saw that that was not good, and so they recessed for a few days, and they caucused and they prayed, and they reached a compromise eventually. And, indeed, the Constitution as we have it didn't even have a vote at the end; it was just consented to by the delegates.

Although, were I a legislator, I would like to impose a two-thirds rule, I don't think I could. I think I would trust them not to kick out things that were by slim majorities.

Senator LEAHY. Let me ask a question of both of you. Who has the authority under article V to review the adequacy and the validity of State applications for a constitutional convention? In the Ervin bill it's Congress, in S. 119 the States themselves.

Professor COGAN. It's the Congress. The Congress has the duty under article V to review the validity of applications--that is, its function with regard to applications, ratifications, and modes of ratification, to determine whether the will of the people has been expressed.

And your questions earlier with regard to what is the will, what is the subject matter that is being called for, were very appropriate. It is your duty to make that determination.

Senator LEAHY. Mr. Armor.

Mr. ARMOR. I agree that it is Congress' business, but Congress may not use that power in such a way as to defeat the whole purpose of article V, and therefore Congress' review should be limited. And that is why I support the bill. For example, in the Hayes-Tilden election, the Presidency of the United States was stolen by the mechanism of having Congress throw out the electoral votes of enough States to give the loser in the election the Presidency of the United States. As you know from history, that was the deal that ended reconstruction, et cetera, et cetera.

The greater discretionary power Congress has to find detailed errors and therefore defeat the process, the less the chance that the second half of article V has any validity whatsoever.

So I agree that Congress has to count and see whether there are 34 and that it has to see whether they do deal with the same general subject. But I do not agree, as the bill does not, that they should go into the internal mechanics of Illinois and say, if this comes to us with the secretary of State's seal from Illinois, did Illinois, in fact, pass it, unless there is some suggestion of outright fraud—it never came from Illinois.

But if it really came from Illinois and Illinois says that's OK, then I think at that point Congress' scope of discretion in review is

to say is Illinois 1 of the 34 and does it deal with the general subject—and there it ends.

Professor COGAN. With regard to the internal procedures of the States, if I understand that to be the thrust of the question, I am in general agreement that the Congress can't review the processes within the State legislatures. However, I think the Congress does have some power, for example, to require that an application be the expression of the majority of a State legislature and perhaps certain other similar requirements.

But, for example, whether an application begins in the statehouse or senate, those kinds of questions are really not for Congress.

Senator LEAHY. Who makes the final decision when somebody says, "Look, we have got 34 applications here," on one side, and somebody else says: "No, you don't have 34, you have got 20 calling for this and 14 calling for that," and somebody else says: "No, no, no, you have got maybe 20 calling for this and 14 calling for that"?

Who makes that determination that, OK, we have 34 bottom line calls for a constitutional convention to do at least—whatever?

Professor COGAN. I may regret this at some later point, but I do believe it is the Congress' judgment with regard to that, and I do believe that most of the questions you have described are nonjusticiable. So the buck will stop here.

By contrast, I believe that with regard to the Congress' judgment whether there can be a limited subject convention, as opposed to a general subject convention—I believe that is justiciable and can be decided by the Court.

But with regard to Congress' determination that such and such is the limited subject matter, or we have so many proper applications and the rest are not proper—I think that is your duty, and I think the buck stops with you.

Senator LEAHY. Mr. Armor.

Mr. ARMOR. I agree—counting the ballots, just as in the Presidential election—we don't know that, or most people don't know that, it's true, Congress counts the ballots; and I think it's the same.

Senator LEAHY. Of course, it has become purely a mechanical——

Mr. ARMOR. Not necessarily, sir. Once in our history the election turned on counting the ballots.

Senator LEAHY. Sure, and there is absolutely no reason to think that might not happen again.

But you feel this is a nonjusticiable issue also?

Mr. ARMOR. I don't go out on a limb and say things are nonjusticiable, because if five members of the Supreme Court decide tomorrow that is a justiciable issue, I am wrong.

Senator LEAHY. And that's happened.

Mr. ARMOR. Yes. So I think it's probably nonjusticiable, that in the first instance that decision—are there 34—rests with Congress.

Senator LEAHY. I have got some other questions that I may want to submit to both of you. Each of you will have a copy of your testimony, and obviously when you look at that and find that you want to expand on any answer, you want to add to anything, feel free to do so. When you review the testimony, you may find, as I often do,

if I am testifying somewhere, that I want to add something. You will be given that opportunity to do so, and the record will be kept open.

But I may well want to send on some more questions to both of you, if I may—you can either answer them or not, as you see fit.

I am going to leave the record open so the replies from the other scholars I have written to may be added. I appreciate both of you being here. It was important that you be here. I think I can safely say that virtually everybody in the Senate, whether they want a constitutional convention or don't want a constitutional convention, are very concerned that we at least have procedures.

We may or may not have a constitutional convention—I wouldn't want to make bets one way or the other. But I do know that we could have total chaos if we don't have some procedures once it starts, if we have one.

And that is what we will try to do here. Senator Hatch will also have some questions. I know he will want to submit.

So I thank you both very, very much.

I also have a statement from Senator Thurmond, who is the chairman of the overall Judiciary Committee, and he wants it placed in the record following Senator Hatch's statement. And that will be done.

[The subcommittee adjourned at 11 a.m.]

APPENDIX

Additional Submissions for the Record

Testimony of

James N. Stasny

on S.119
before the
U.S. Senate Subcommittee on the Constitution

I welcome the opportunity to give my views on S.119.

While I am a member of the staff of the Senate Budget Committee, the opinions I express today are entirely my own as a student of the literature on constitutional conventions. My views, therefore, are not to be mistaken as reflecting those of the Committee generally, either party separately, or any member individually.

I would prefer that a federal constitutional convention not be held.

My position is based -- not on any fear of a convention -- but rather on reservations about the amendments sure to become the primary focus at such a gathering. Yet, if a convention is to be held, I believe it is important that it be as open and free of congressional restriction as possible. Despite my concern over amendments currently in fashion, there may come a day when the only way an amendment I personally support could be added to the Constituution is through a convention.

I would not want my chances hindered by a precedent which dilutes the potential of a convention. I am afraid S.119 would do just that, and make a convention a second-string vehicle, a creature of rather than a companion to the Congress in proposing constitutional amendments.

S.119 institutionalizes a restriction not found in Article V. Throughout the bill, reference is made to "an amendment or amendments on the same general subject." Over the years literally hundreds of applications for a convention have been submitted by the states. Consequently, practice -- or lack of it -- has made part of the constitutional fabric the notion that only when applications from two-thirds of the states have been received on a specific issue will a convention assemble. This, it seems to me, is an implicit limit on the convention trigger mechanism.

However, though custom has colored the process which leads to a convention, no such custom should be inferred about the authority of a convention once it meets. S.119 takes that next step, and I do not believe it is warranted.

The bill says the only amendments which can be considered are those which were named in the state applications. Moreover, the measure assigns to the Congress the power to delay or deny submitting any amendment to the states which was not listed in applications from two-thirds of their number.

I do not believe Congress should have so broad a scope in influencing the convention outcome. While I do not question the authority of Congress to specify housekeeping details -- such as the date a convention would assemble, where it would meet, and for how long -- I am hard pressed to believe that the Founding Fathers would have provided an alternate means of amendment if they though both means would come to be dominated by the Congress.

Article V does not limit the Congress to submitting one or other amendments on pre-determined subjects. Congress can submit amendments on the topic it chooses. I see no reason why the same deliberative potential should be denied a convention. The convention should have the same right to submit one or a series of amendments on the topic of its choice in the same way that Congress has that right.

Not every amendment submitted by Congress has been ratified by the states. And Congress has not always chosen to submit one amendment at a time. On September 25, 1789, Congress proposed twelve amendments. The states chose to ratify ten of them. Two -- including one dealing with the compensation of Members of Congress -- were not ratified.

When the Constitution was written, the states were still highly suspicious of centralized authority. As Gordon Wood has pointed out, the states had recent and satisfactory experience with conventions of the people. I would think it very unlikely the Founding Fathers would have intended to give a suspect national legislature more power than they would give to a convention composed of the separate states.

For those reasons, I would prefer to see stricken from the bill those references which imply that a convention is limited to considering only those amendments specified in advance. It may be that, as a practical matter, adding up the applications on a specific amendments has become a realistic way of determining when a convention should be held. But I do not believe that arithmetic should become a blanket on what a convention can do. As experience confirms, the ratification process is blanket enough.

Aside from this general concern, let me single out certain features of S.119 about which some questions should be raised. Section 7(a) would prevent any member of Congress from serving as a convention delegate. Members of the Continental Congress were not denied participation in the convention of 1787. According to Max Farrand, three-fourths of the delegates had been members of the Continental Congress. In fact, at least four men -- William Pierce of Georgia, Pierce Butler of South Carolina, Nathaniel Gorham of Massachusetts, and Nicholas Gilman of New Hampshire -- were members of Congress at the time of their selection as delegates to the convention.

If S.119 excludes members of Congress because of a suspicion that they would wield influence out of proportion to their

numbers, then I would prefer that this bill mirror the same suspicion in a less damaging manner. I would rather see individual Members of Congress allowed to serve in a convention where their influence can be measured, than permit the entire Congress to exert dominant influence by approving a bill which restricts the convnetion before it even assembles.

Moreover, I would point out that at least in the Democratic Party, Members of Congress are allowed to serve as delegates to their party's presidential nominating convention. While I make no claim that the conventions are comparable, it seems to me that if a Member of Congress is good enough to help nominate a constitutional officer, he or she ought to be good enough to help amend the Constitution, even at a convention.

Section 4(a) directs that convention applications should be transmitted to both the President of the Senate and the Speaker of the House. In 1977, I examined 32 applications submitted to Congress during the preceding three years. Half were sent to the President of the Senate and the Speaker. Eleven others were sent to the Secretary of the Senate and the Clerk of the House.

Of those sent to the presiding officers, more than a quarter of them were not recorded in the Congressional Record by <u>both</u> the House and the Senate. But of those sent to the Secretary of the Senate and the Clerk of the House, all but one were listed in the Congressional Record by both houses.

My research found further that directing applications to the presiding officers appears to be at modest odds with established practice in the House of Representatives. Rule XXII of the House directs that memorials be delivered to the Clerk, a procedure dating from 1842. In the Senate, Rule VII, paragraph 2 of the Standing Rules noted that Senators having memorials may deliver them to the Secretary of the Senate.

Overall, the ruls of both houses allow for delivery of these documents to someone other than the presiding officers, while the evidence suggests that applications are more likely to be properly received when delivered to the Clerk and the Secretary. For these reasons, S.119 chould be revised to either require delivery of the applications to the Clerk and the Secretary, or to both officials in addition to the presiding officers.

Section 6(b) of S.119 directs that a convention shall be convened not later than eight months after it is summoned. This provision differs from the comparable section of an earlier version of this convention bill, S.817, proposed in March of 1981. I would like to think the change was made to give the states more time to choose delegates, and for the delegates to prepare themselves. Unfortunately, I suspect the longer time period is intended to give Congress more time to act first on an amendment of its own, and obviate the need for a convention.

I also find it puzzling that while S.119 would give the convention eight months lead-time before it assembles, Section 9(c) would allow the convention only six months to meet unless the time is extended by Congress. Incidentally, the time period could be extended by passage of a concurrent resolution, a vehicle often reserved for matters under the direct control of Congress. This may be further, unintended evidence of a presumption that a convention is a creature of the national legislature.

Section 8(c) allows the General Services Administration (GSA) and other departments of the federal government to provide such information and assistance as the convention may require. The only problem is the assistance would only be available upon the written request of the elected presiding officer of the convention.

The experience of the states with revision of their own constitutions has demonstrated the importance of thorough, logistical planning and research. In fact, if I may quote from a booklet prepared in 1971 for the Montana Constitutional Convention, "It has long been recognized that the effectiveness of a convention

may be greatly effected by the nature and quality of ... preparation. The preparation for the New York convention of 1915 set a standard for preparatory work than has been imitated if not always matched by preparation for conventions in many other states."

The lack of some pre-convention secretariat is one of the glaring omissions of this bill. I believe it would be especially useful if the bill provided for either a non-partisan coordinating unit which could draw upon the resources of the federal agencies before a convention met, or the designation of some lead agency -- perhaps the General Services Administration or the Advisory Commission on Intergovernmental Relations -- to coordinate pre-convention planning. Certainly ACIR would be an intriguing possibility reflecting as it does the views of both political parties as well as Congress, the states, and local and county governments.

Regardless of what shape a pre-convention planning unit might take, it seems to me imperative the bill not overlook the need for services, research, and basic organization prior to the time a convention assembles.

Section 11(b) would allow the Congress the authority to agree to a concurrent resolution stating that it does not direct the submission of a proposed amendment to the states if the subject matter differs from that included in a state convention application.

This provision goes right to the heart of my concern that Congress will have the power to dominate a convention under S.119. In effect, this section gives the Congress a potential legislative veto over the work of a convention. Article V says Congress shall call a convention. It does not say it shall call it "out" -- as in out-of-bounds, or out-of-order.

I would urge that this section be stricken from the bill, and the Congress' role in a convention be circumscribed, and confined to simple, ministerial functions.

Having said all this, I have no illusions that any of the changes I suggest will be included in the bill. Therefore, I would suggest, as an alternative, an addition to the bill which mighthelp balance out the scale of power between Congress and the convention. I would add a section expressing the Congressional preference that any amendment reported by a convention be ratified by state conventions.

I say "expressing a preference" because I am not certain this statute is the appropriate place to determine how an as-yet-unfashioned amendment will be ratified. Yet, if Congress is determined to supervise what a convention does, there at least ought to be a provision giving the public a better chance to have a voice on whether any amendment should be ratified.

The case of Hawke v. Smith makes it clear that states may not hold referenda on the ratification of an amendment to the U.S. Constitution. But specifying the state convention method of ratification would expand the opportunities for the public to be involved. It has happened before.

On February 20, 1933 Congress proposed the Twenty-First Amendment repealing prohibition. It specified that the amendment be ratified by state conventions, and ratification was accomplished the same year. It is worth noting that although a number of bills were introduced in the Congress which would have established guidelines for the state conventions, no federal guidelines were ever adopted, thus leaving control of those conventions solely in the hands of the states. The individual states created a broad variety of conventions ranging in size from Indiana with 329 delegates to New Mexico with only three delegates.

The advantage of state ratifying conventions should be clear. Although candidates could choose to run as uncommitted, in most cases delegate slates would likely be listed as for or against ratification. Voters would thus have at least an indirect means of expressing their preference for ratifying any amendment

proposed by a federal convention. And if the precedent set by ratification of the Twenty-First Amendment does not make a case for state conventions, it should be noted that the Constitution itself was ratified by conventions in the several states.

Regardless of the fate of S.119, there are obvious risks in holding a national constitutional convention. It might look peculiar to our international allies. It might even be perceived as a sign of weakness by our enemies. It could be chaotic, and it might prove to be a waste of time. But if a convention is what the public wants, then they ought to be given a fair chance to have one.

The State of California will have a measure on the November ballot permitting voters to say whether they believe the state legislature should apply to Congress for a convention. The same type of measure may appear on the Montana ballot. A convention may be waiting in the wings

It seems to me Congress has a substantial dilemma on its hands. Each member is charged to protect and defend the Constitution. But, in the process, you must ask yourselves if this body of 535 claims a superior right to limit the public's right to change the Constitution. This bill, S.119, appears to say that Congress does, in fact, have such a right.

I believe you have the right to try. But I strongly believe that, pushed to the wall, any attempt by Congress to resist a determined public must ultimately fail. I believe it would be in the best interests of all concerned if Congress kept its guidlines for a convention to the bare minimum.

The convention should have the right to make its own mistakes, just as Congress does, knowing that the ultimate way to correct errors resides in the people, at the ballot box for Congress, and at the ratification stage for a convention.

A NATIONAL CONSTITUTIONAL CONVENTION:

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James N. Stasny

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JAMES MADISON
ON "A SECOND CONVENTION"

In the latest round of debate on the advisability of calling a constitutional convention to consider a balanced-budget amendment, it has become fashionable to quote James Madison on the dangers of such a procedure. No one would challenge the expertise of Madison in this matter, for he was one of the most knowledgeable and influential members of the 1787 convention that forged the United States Constitution. But it is important that his opinions be recalled accurately and in the context of the period in which they were formed. Two of the recent spate of articles and editorials warning of the evils of the convention system have - unwittingly, I am sure - quoted Madison in ways that overlook the specific purpose of his comments as well as the circumstances that gave rise to them.

The first significant misuse of Madison's words appeared in a newspaper article by former Secretary of Defense Melvin R. Laird.[1] Taking for his text part of one sentence from a letter written by Madison to George Lee Turberville, Laird attempted to demonstrate that Madison's fears regarding the calling of a constitutional convention are even more appropriate today than they were in the 1780s. The particular statement cited was Madison's warning that ". . . The prospect of a second [constitutional] convention would be viewed by all Europe as a dark and threatening cloud hanging over the Constitution." This ominous forecast prompted Laird to go beyond the usual

prediction of a "runaway" convention that would "take the first steps toward a possible wholesale revision of the Constitution." The international effect of calling a convention today, he said, "would send tremors throughout all those economies that depend on the dollar; would undermine our neighbors' confidence in our constitutional integrity; and would weaken not only our economic stability but the stability of the free world."

Historically, there are two serious flaws in Laird's presentation, one of fact, one of interpretation. The quotation he used was not, as he stated, written "in 1787, upon the adjournment of the only federal constitutional convention held in our nation's history." It was part of a long letter written November 2, 1788, more than a year after the Philadelphia convention had concluded its work but before the government the Framers had designed could begin to function.[2] More important, the letter explained in detail Madison's continued objection to a "general convention as suggested by New York." Although he had not opposed inclusion of the convention method of amendment when this was voted upon at the Philadelphia convention,[3] Madison argued against Edmund Randolph's recommendation that the states be permitted to propose amendments to the completed constitution, after which a second federal convention would be called to settle all outstanding issues.[4] In this, Madison was concerned, not with elimination of the convention system from Article V, but with the prospect that opponents of the Constitution would use a second convention to destroy the Constitution and return the country to the state of impotence it had experienced under the Articles of Confederation.

He expressed this fear candidly in a letter to Randolph dated 10 January 1788, saying, "The very attempt at a second Convention strikes at the confidence of the first." Given the continued, bitter opposition of such powerful men as Patrick Henry of Virginia and Governor George Clinton of New York, Madison anticipated that "were a second trial to be made, the friends of a good constitution for the Union would not only find themselves not a little differing from each other as to the proper amendments; but perplexed & frustrated by men who had objects totally different. A second convention," he went on, "would of course be formed under the influence, and composed in great measure of members of the opposition in the several States."[5]

The letter to Randolph was written during the period when conventions in the thirteen states were considering whether or not to ratify the proposed constitution. Months later, after the Constitution had been approved by most of the states, but before the new president and Congress had assumed office, the threat of "a second convention" remained. It was at this point that Madison reviewed for Turberville the probable consequences of such an event. Dwelling principally on domestic repercussions, he added that the country's reputation as a stable, solvent nation worthy of respect in the international community rested on its effective performance under the new Constitution. In this portion of the letter, referred to in part by Laird, Madison wrote:

> It is not unworthy of consideration that the prospect of a second Convention would be viewed by all Europe as a dark and threatening Cloud hanging over the Constitution

> just established, and perhaps over the Union itself; and wd. therefore suspend at least the advantages this great event has promised us on that side.

Asserting that the work of the Philadelphia convention had filled Europe "with equal wonder and veneration," Madison concluded:

> The last loan in Holland and that alone, saved the U.S. from Bankruptcy in Europe; and that loan was obtained from a belief that the Constitution then depending [pending] wd. be certainly speedily, quietly, and finally established, & by that means put America into a permanent capacity to discharge with honor & punctuality all her engagements.[6]

To compare, as Laird does, the superpower status of today's U.S. with the weak and disorganized thirteen states of 1788, straining to win acceptance as a diplomatic equal in the major capitals of Europe and struggling to form a stable national government, is to substitute fantasy for reality.

The Laird thesis takes no notice of another basic difference between the "second convention" sought in 1787-88 and that requested today. Two centuries ago the demand was for a "general convention" whose purpose was to review and possibly revise the entire Constitution. No Article V petition of the past twenty years has called for consideration of more than a single question. By implication, Laird dismisses this difference with the assumption that, once called, any convention may proceed to dismantle the Constitution. The reasonableness of this assumption leads to consideration of another Madison quotation.

In august of 1984 the Senate Committee on the Judiciary

issued a report that summarized the committee's judgment of a bill that would establish regulations to govern the calling and functioning of a constitutional convention.[7] A major objective of the bill is to restrict a convention's authority to the particular subject for which it was requested by two-thirds of the states. While the committee as a whole expressed confidence in those experts who believe Congress has the power to accomplish this, several senators filed supplemental opinions indicating serious doubts as to the authority of Congress to legislate any limit on convention activity. Among the latter was Charles McC. Mathias, Jr. Although he supported the effort to design convention regulations, Senator Mathias was swayed by the opinion of one expert who stated categorically that "the attempt to limit the convention's jurisdiction would render the entire bill unconstitutional."[8] The senator's further argument focused principally on two points: his evaluation of the constitutional convention of 1787 as "a runaway convention," and a selection from the same Madison letter that had been cited earlier by Melvin Laird.

Assuming at the outset that the Framers of the Constitution had decided, without any authority whatever, "to replace the organic law of the nation with another," Senator Mathias defines the Framers' mandate than the Congress did in 1787. To say, as the senator does, that the members of the Philadelphia assemply "were empowered only to propose refinements to the Articles of Confederation" does not reflect the intent of Congress as indicated in its charge to the convention. Congress

began its message by pointing to the "defects in the present Confederation" and the need for "establishing in these states a firm national government" in place of what the Articles of Confederation termed "a firm league of friendship."[9] It then resolved that the convention delegates should meet, not merely "for the sole and express purpose of revising the Articles of Confederation," but to devise "such alterations and provisions as shall . . . render the federal constitution adequate to the exigencies of Government & the preservation of the Union."[10] As this last phrase suggests, many of the country's leaders, in Congress and out, were convinced that the very existence of the United States as a viable nation-state was threatened by the political and economic devisiveness and instability that prevailed under the Articles of Confederation. The defects of that agreement were so serious that few questioned the need for substantial change. Thus, the instructions given by most of the states to their convention delegates either copied or paraphrased the wording of the congressional resolution.[11] Several granted their representatives even greater lattitude. New Hampshire, for example, found the powers of the central government under the Articles "far inadequate to the enlarged purposes which they were intended to produce" and authorized its delegates simply to "decide upon the most effectual means to remedy the defects of our federal union."[12] North Carolina used similar language,[13] while Virginia called for "extending the revision of the foederal System to all its defects."[14] Of the twelve states represented at Philadelphia,[15] only Delaware, conscious of the population limits imposed by its small size, bound its

delegates to resist changing the one provision in the Articles which guaranteed that in Congress "each State shall have one vote."[16]

In light of these circumstances, the characterization of the Philadelphia convention as a "runaway" must rest principally on the action of that body in ignoring the amendment provision of the Articles which stated that alterations "be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state."[17] But even this criticism cannot be directed solely at the convention, for its work was accepted by Congress for transmission to the states "in order to be submitted to a convention of Delegates chosen in each state by the people thereof."[18] Further, as James Madison pointed out in his spirited defense of the new constitution, adherence to the unanimity rule would permit "the absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth."[19]

Opposition to the new constitution was strongest among states-rights advocates who refused to accept the greater concentration of authority in the national government proposed by the Philadelphia delegates. The instrument by which they hoped to defeat such a change was a second convention, initially recommended by Edmund Randolph for very different reasons. Even after the Constitution had been approved by the nine states required to put it into effect,[20] its opponents called for another convention to consider changes. Madison acknowledged the need for some amendments - chiefly a Bill of Rights - but argued that the new Congress could prepare these additions in its first

session and submit them to the states for ratification. Part of Madison's warning against calling a convention for this purpose was cited by Senator Mathias in the Judiciary Committee report mentioned earlier. The quoted portion is misleading in that it presents Madison's opinion as though it were a condemnation of any use of the convention system at any time in the future. The quotation begins: "[An Article V Constitutional Convention] would consequently give greater agitation to the public mind;" . . . .[21] Actually, Madison opened this portion of his analysis as follows:

> If a General Convention were to take place for the avowed and sole purpose of revising the Constitution, it would naturally consider itself as having a greater latitude than the Congress appointed to administer and support as well as to amend the system; it would consequently give greater agitation to the public mind; . . . ."[22]

Unquestionably, Madison preferred congressional action, rather than convention action, to initiate constituional amendments. His preference was based, in part, on the absence of guidelines for the conduct of a convention. As his final comment on this matter to the Philadelphia delegates revealed, "Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a convention on the like application. He saw no objection however against providing for a convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum, etc. which in constitutional regulations ought to be avoided as much as possible."[23] It is significant that this remark did not provoke further discussion

of how a convention should function, and at no time did any of the Philadelphia deleges address the issue of limited versus unlimited convention authority. Even during the bitter debate over ratification of the constitution, references to this question were few and far between. The two clearest statements came from Madison's chief collaborator in the writing of the Federalist papers and from a member of the ratifying state convention in Virginia. Alexander Hamilton, like Maidson a vigorous opponent of a second general convention, assured New York voters that if the proposed constitution were adopted, amendments could be made subsequently, one at a time. The relevant paragraph in his appeal reads as follows:

> But every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point - no giving or taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather ten States, were united in the desire of a particular amendment that amendment must infallibly take place. There can, therefore, be no comparison between the facility of affecting an amendment, and that of establishing in the first instance a complete Constitution.[24]

In Virginia, Wilson Nicholas suggested the concept of a limited convention when he told that state's delegates that he preferred the convention mode of amendment for these reasons:

> The conventions which shall be so called will have their deliberations confined to a few points; no local interest to divert their attention; nothing but the necessary alterations. They will have many advantages over the last convention. No experiments to devise; the general and fundamental regulations being already laid down.[25]

Current consideration of the problem of convention controls has been overshadowed by debate as to whether the convention system is desirable and, more specifically, whether a balanced-budget amendment should be adopted. One needn't be either for or against the convention system, for or against a balanced-budget amendment, to realize that the more immediate question is: what happens when the 34th state application for a convention reaches Washington? As the record clearly shows, the Founding Fathers did not deal with this problem, and fragmentary selections from their writings provide a poor foundation for assuming that, were they alive today, the solons of 1787 would reject either the convention method of amendment or legislation that would systematize the convention process.

The long-term solution would be a modification of Article V that would either eliminate the existing provision for a national convention or add a provision to authorize limited as well as general conventions, as one or the other may be requested by two-thirds of the states. However, the unlikelihood of such a change being effected within the foreseeable future leaves legislative regulation of limited conventions as the only sensible temporary alternative. Sooner or later, widespread support for a particular amendment will bring applications for a convention from 34 states. If no controls have been established before the 34th application arrives, the resulting crisis will be far more serious than any legal wrangling that may arise over the constitutionality of such regulations.

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NOTES

1. Melvin R. Laird, "James Madison Wouldn't Approve," Washington Post, 13 February 1984.

2. James Madison, The Papers of James Madison, ed. Robert A. Rutland and Charles F. Hobson (Charlottesville, Va.: University Press of Virginia, 1977), 11:330-32.

3. U.S. House of Representatives, Documents Illustrative of the Formation of the Union of the American States (69th Cong., 1st sess., 1927), House Document 398, pp. 735-36. This single-volume compilation will be used for all references to records of the constitutional convention of 1787 and will be cited hereafter as Documents. An analytical study of these records is the four-volume classic by Max Farrand, The Records of the Federal Convention of 1787 (New Haven, Conn.: Yale University Press, 1923).

4. Documents, pp. 698, 701, 737. Randolph's proposal was offered and turned aside on three occasions, with no comment from Madison.

5. The Papers of James Madison, 10:354-56.

6. Ibid., 11:331-32.

7. U.S. Senate, Committee on the Judiciary, Constitutional Convention Implementation Act of 1984 (98th Cong., 2d sess., 1984) Report 98-594.

8. Ibid., p. 63.

9. Articles of Confederation, Art. III, Documents, p. 27.

10. Documents, p. 46.

11. Ibid., pp. 55-84.

12. Ibid., pp. 55-56.

13. Ibid., p. 75.

14. Ibid., p. 69.

15. Rhode Island, the smallest state, refused to send delegates to the constitutional convention.

16. Documents, p. 67

17. Articles of Confederation, Art. XIII, Ibid., p. 35.

18. Documents, p. 1007.

19. The Federalist, no. 40. The thirteenth state Madison was referring to was Rhode Island, which had refused to send delegates to the Philadelphia convention.

20. The ninth state to ratify the Constitution was New Hampshire, on 21 June 1788. However, acceptance of the new plan of government was not assured until it had been ratified by the two largest states, Virginia and New York. Conventions in those two states consented to ratification on 26 June and 26 July, 1788, respectively. See Documents, pp. 1024-1038.

21. Judiciary Committee Report, op. cit., p. 66.

22. The Papers of James Madison, 11;331.

23. Documents, p. 735. For a more detailed examination of the debates leading to adoption of Article V, see Wilbur Edel, A Constitutional Convention: Threat or Challenge? (New York: Praeger, 1981), chapters 1 and 2.

24. The Federalist, no. 85.

25. Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution by the General Convention at Philadelphia in 1787 (Philadelphia: J. B. Lippincott, 1891), 3:102. A more general defense of Article V was made by James Iredell in the North Carolina convention, ibid., 4:176-77.